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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 833

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

D. E. WHEELER AND D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,

Plaintiffs in Error,

vs.

THE COUNTY OF PLUMAS,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX

In the Superior Court of the State of California, in and for the County of Plumas.

COUNTY OF PLUMAS,

Plaintiff,

vs.

D. C. WHEELER and D. W. RIDENOUR, Partners Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,

Defendants.

Complaint.

Plaintiff above-named, complaining of the above-named defendants, for cause of action, alleges:

1.

That at all the times herein mentioned, plaintiff has been, and now is, a municipal corporation created by and existing pursuant to the laws of the State of California.

2.

That defendants now are, and during all the times herein mentioned have been, partners, and engaged in and carrying on the business hereinafter mentioned in the county of Plumas, under the firm name and style of Wheeler & Ridenour.

3.

That on the 9th day of January, A. D. 1900, the Board of Supervisors of the county of Plumas, at a regular session thereof, in pursuance of the powers in them vested by law, passed by unanimous vote, and thereafter, and within the time provided by law, caused to be duly published, an ordinance, numbered 125, of which the following is a true copy, to wit:

"ORDINANCE No. 125.

"An ordinance levying a license tax on persons, firms, copartnerships and corporations, carrying on the business of raising, grazing, herding or pasturing sheep or lambs within the county of Plumas, and providing for the collection of the same.

"The Board of Supervisors of Plumas County do ordain as follows:

"Sec. 1. Every person, firm, copartnership or corporation, engaged in the business of raising, grazing, herding or pasturing sheep or lambs within the county of Plumas, State of California, must annually procure a license therefor from the license collector of said county and shall pay therefor the sum of $10 for each one hundred sheep or lambs, owned by, in the possession or under the control of such person.

"Sec. 2. Each and every person, copartnership, firm or corporation, who may engage in the business of raising, grazing, herding or pasturing sheep or lambs within the county of Plumas, State of California, in order to procure a license therefor, must present to the license collector of Plumas County at the time of making appli-

cation therefor, an affidavit showing the number of sheep and lambs owned by, in the possession of, and under the control of such applicant for license within the county of Plumas, and upon presenting such affidavit and the payment of the license tax, as prescribed in section 1 of this ordinance, the applicant shall be granted a license to raise, graze, herd or pasture sheep or lambs within the county of Plumas.

"Provided, however, that any person who states in said affidavit a number of sheep or lambs less than the actual number of sheep or lambs owned by, in the possession of, or under the control of such person, in said Plumas County, shall be liable to said county of Plumas in the additional sum of ten dollars for each one hundred head of sheep or lambs so owned by, in the possession of, or under the control of such person; and all of the provisions of this ordinance relative to the collection of the license tax by this ordinance imposed, shall be applicable to suits for the collection of the said additional ten dollars per hundred head.

"Sec. 3. The license collector shall have the collection of the license provided for by this ordinance, and it is hereby made his duty to collect the same; and if any person required to take out a license under the provisions of this ordinance fails, refuses or neglects to take out such license, the license collector shall direct the district attorney to bring suit in the name of the county of Plumas against such person for the recovery of such license; and in such case, either the license collector or the district attorney may make the necessary affidavit for, and a writ of attachment may issue without any

bond being given on behalf of the plaintiff; and in case of recovery by the plaintiff, fifty dollars damage must be added to the judgment and costs to be collected from the defendant.

"Sec. 4. It is hereby made the duty of the said license collector to ascertain by actual count, or otherwise, as in his judgment may seem best, at the time any person, firm, copartnership or corporation, commences in said county of Plumas, the business mentioned in this ordinance, the correct number of sheep and lambs owned by, in the possession of and under the control of such person, firm, copartnership or corporation, in said Plumas County.

"Sec. 5. The county auditor shall prepare and have printed suitable blank licenses for the license collector to carry out the provisions of this ordinance, with blank receipts for the license collector when sold.

"Sec. 6. The license collector shall collect a fee of one dollar for each license sold, which shall be paid into the salary fund of the county.

"Sec. 7. All money collected for license under the provisions of this ordinance shall be paid over to the county treasurer, as other moneys are, and placed to the credit of the general fund of the county.

"Sec. 8. The license to be collected under this ordinance is a debt owing to the county of Plumas; and shall become due and payable to said county in advance at the office of the license collector of said county.

"Sec. 9. This ordinance shall take effect and be in force on and after fifteen days from its passage, and all

ordinances and parts of ordinances in conflict herewith are hereby repealed; provided that no actions, either civil or criminal, under ordinance No. 110, entitled 'An ordinance levying a tax on persons engaged in the business of raising, grazing or pasturing sheep or lambs within the county of Plumas for the year 1898, and providing for the collection of the same,' passed by the Board of Supervisors of said Plumas County, January 7th, 1898, pending at the date this ordinance takes effect, shall be deemed to be affected by this ordinance; but said ordinance, so far as such actions are concerned, shall be deemed to be continued in force, notwithstanding such repeal.

"The above ordinance was passed by the Board of Supervisors of Plumas County, California, at a regular meeting of said board, held January 9th, 1900, by the following vote: Frank Campbell, Chairman, aye; J. W. Denton, aye; H. McCutcheon, aye; J. Stephan, aye; L. W. Bunnell, aye.

"Attest: H. C. FLOURNOY,
"Clerk."

"State of California,
"County of Plumas. } ss.

"I, H. C. Flournoy, clerk of the county of Plumas, California, and ex-officio clerk of the Board of Supervisors of said county, do hereby certify that the foregoing ordinance, entitled Ordinance No. 125, consisting of nine sections, was duly passed by the said Board of Supervisors at a regular meeting thereof on the 9th day of January, 1900, by the following vote: Ayes—Supervisors F. Camp-

bell, H. McCutcheon, J. W. Denton, J. Stephan, L. W. Bunnell; noes—None.

"In witness whereof, I have hereunto set my hand and affixed my official seal this 9th day of January, 1900.

"H. C. FLOURNOY,

"Clerk of the County of Plumas, California, and ex-officio Clerk of the Board of Supervisors thereof."

4.

That said ordinance took effect fifteen days after its passage, as aforesaid, and ever since said time, said ordinance has been, and same now is, in full force and effect, and no part thereof has been repealed.

5.

That since the passage and publication of said ordinance as aforesaid, and while the same was and is in full force and effect, to wit, between the 1st day of May, 1900, and the 10th day of July, 1900, the said defendants engaged in, and still are engaged in, the business of raising, grazing, herding and pasturing sheep and lambs in the said county of Plumas, State of California.

6.

That said defendants, during the said time, between the 1st day of May, 1900, and the said 10th day of July, 1900, owned, possessed and had under their control within said county, and do still so own, possess and have under their control within said county of Plumas, State of California, twenty-one thousand sheep and lambs; and did, during said time, engage in and carry on, and still are engaged in and carrying on, the said business of raising, grazing, herding and pasturing within said county

of Plumas, State of California, the said twenty-one thousand sheep and lambs.

7.

That plaintiff has heretofore duly demanded of said defendants the payment of said license, as in said ordinance provided, but defendants have wholly failed, neglected and refused, and do still fail, neglect and refuse, to take out or procure the license required by said ordinance, or any license whatever therefor, or to pay to the said county of Plumas the sum of money as required by said ordinance, or any sum of money whatever; and said defendants have engaged in and carried on, and are still engaged in and carrying on, said business in said county, as aforesaid, without taking out or procuring any license whatever so to do.

8.

That on the 9th day of July, 1900, and prior to the commencement of this action, the license collector of said Plumas County did direct the district attorney of said Plumas County to commence suit in the name of said county against said defendants for the recovery of said license.

9.

That the sum of two thousand one hundred and fifty dollars is now due, owing and payable from defendants to plaintiff, and no part thereof has been paid.

Wherefore, plaintiff prays the judgment of this Court against said defendants for the sum of twenty-one hundred dollars due for license, as aforesaid; the further

sum of fifty dollars damages, as provided in said ordinance, and its costs of this suit.

U. S. WEBB,

Attorney for Plaintiff and District Attorney of Plumas County.

State of California, }
County of Plumas. } ss.

I, H. C. Flournoy, county clerk of Plumas, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of a complaint now on file in my office.

Witness my hand and seal of said Court, this the 20th day of August, 1900.

[Seal] H. C. FLOURNOY,

County Clerk and ex-officio Clerk of the Superior Court.

[10c. internal revenue stamp. Canceled.]

[Endorsed]: Filed July 11th, 1900. H. C. Flournoy, Clerk.

In the Superior Court of the County of Plumas, State of California.

THE COUNTY OF PLUMAS,
Plaintiff,

vs.

D. C. WHEELER and D. W. RIDENOUR, Partners Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Special Appearance of Defendants.

To the Plaintiff in the Above-entitled Case and to U. S. Webb, Esq., Its Attorney:

You are hereby notified that we, the undersigned, hereby enter our special appearance in the above-entitled cause, for the special purpose, and none other, of filing a petition and bond for the removal of said cause to the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CAMPBELL & METSON,
Attorneys for Defendants.

[Endorsed]: No. 997. In the Superior Court, County of Plumas, State of California. The County of Plumas, Plaintiff, vs. D. C. Wheeler et al., Defendants. Special Appearance. Filed August 4th, 1900. H. C. Flournoy,

Clerk. By R. L. Erwin, Deputy Clerk. Service of the within special appearance is hereby acknowledged this 4th day of August, 1900. U. S. Webb, Attorney for Plaintiff.

State of California,
County of Plumas. } ss.

I, H. C. Flournoy, county clerk of Plumas, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of a special appearance now on file in my office.

Witness my hand and seal of said Court, this the 20th day of August, 1900.

[Seal] H. C. FLOURNOY,

County Clerk and ex-officio Clerk of the Superior Court.

[10c. internal revenue stamp hereto attached. Canceled.]

In the Superior Court of the State of California, in and for the County of Plumas.

THE COUNTY OF PLUMAS,
Plaintiff,

vs.

D. C. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Petition for Removal of Cause.

To the Honorable Superior Court of Plumas County, State of California:

The petition of D. C. Wheeler and D. W. Ridenour, partners, doing business under the firm name and style of Wheeler & Ridenour, the defendants in the above-entitled action, respectfully shows to this Honorable Court:

I.

That your petitioners are the defendants in the above-entitled action; that the said action has been commenced against them as partners, as aforesaid, in the said court by the plaintiff, to wit, the county of Plumas, a body politic and municipal corporation, under the laws of the State of California, and that said action is of a civil nature.

II.

That the said plaintiff, on the 11th day of July, 1900, filed its complaint against the said defendants in the Superior Court of the State of California, in and for the county of Plumas.

That the time has not elapsed wherein your petitioners are allowed, under the practice and laws of the State of California, and the rules of said Court, to appear, plead, demur, or answer said complaint.

III.

That at all the time said action was commenced, and continuously, for a long time prior thereto, and at all the times herein mentioned, the said plaintiff, the county of Plumas, was and is a body politic and municipal corporation under the laws of the State of California; and that the said plaintiff to wit, the county of Plumas, a body politic and municipal corporation under the laws of the State of California, was, at the time said action was commenced, and continuously for a long time prior thereto, ever since and at all times mentioned herein, is and was a citizen and resident of the State of California, within the jurisdiction of the United States Circuit Court, Northern District of California, State of California.

That at the time said action was commenced, and continuously for some time prior thereto, ever since, and at all the times herein mentioned, the defendants were and are residents and citizens of the State of Nevada, and were and are not residents or citizens of the State of California.

IV.

That the controversy in this action, and every issue of fact and law therein, is wholly between citizens of different states; and every issue of fact and law involved in this controversy can be fully determined as between them, that is to say, as between this plaintiff, the county of Plumas, a body politic and municipal corporation; and the defendants, D. C. Wheeler and D. W. Ridenour.

V.

That the time of your petitioners, the defendants herein, to answer or plead to the complaint in the said action, filed as aforesaid, in the said Superior Court of California, in and for the county of Plumas, on the 11th day of July, 1900, has not yet expired; and your petitioners have not yet filed any paper, appearance, or pleading in said action, nor have they in any other way appeared therein.

VI.

That the matter in dispute in said action, and for which said action is brought, is an alleged debt, to wit, the sum of two thousand one hundred and fifty dollars, exclusive of costs, alleged to be due from defendants to plaintiff.

VII.

Your petitioners herewith present a good and sufficient bond as provided by the statute in such case, that they will on or before the first day of the next ensuing session of the United States Circuit Court, Northern District of California, State of California, file a transcript therein of the record in this action, and for the payment of all costs which may be awarded by said Court, if said Circuit

Court shall hold that this suit was wrongfully or improperly removed thereto; and your petitioners pray that this Court proceed no further herein except to make the order of removal as required by law, and accept the bond presented herewith, and direct the transcript of the record herein to be made for said Court, as provided by law, and as in duty bound, and your petitioners will ever pray.

D. W. RIDENOUR,
D. C. WHEELER,
Petitioners.

State of Nevada,
County of Washoe. } ss.

D. W. Ridenour, being duly sworn, says that he is one of the defendants in the above-entitled action, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

D. W. RIDENOUR.

Subscribed and sworn to before me this 31st day of July, A. D. 1900.

[Seal] MARCUS FREDERICK,
Notary Public in and for Washoe County, Nevada.

[Endorsed]: Filed August 4th, 1900. H. C. Flournoy, Clerk. By R. L. Erwin, Deputy Clerk.

State of California,
County of Plumas. } ss.

I, H. C. Flournoy, County Clerk of Plumas and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of a petition now on file in my office.

Witness my hand and seal of said Court, this the 20th day of August, 1900.

[Seal] H. C. FLOURNOY,
County Clerk and Ex-officio Clerk of the Superior Court.

In the Superior Court of the State of California, in and for the County of Plumas.

THE COUNTY OF PLUMAS,
Plaintiff,

vs.

D. C. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Notice of Motion for Order of Removal.

To U. S. Webb, District Attorney of Plumas County, Attorney for Plaintiff:

Please take notice that the defendants in the above-entitled case will, on the tenth day of August, 1900, at ten o'clock, A. M., of said day, or as soon thereafter as counsel can be heard, move the above-entitled court for an order removing said cause to the Circuit Court of the United States, for the Northern District of California, Ninth Circuit, in accordance with the petition of defendants, a copy of which is hereto attached.

Dated August 4th, 1900.

J. C. CAMPBELL and
W. H. METSON,
Attorneys for Defendants.

Due service of the above and foregoing notice of motion with a copy of the petition to remove said cause to the Circuit Court of the United States, Ninth Circuit, is hereby admitted this 4th day of August, 1900.

U. S. WEBB,

Attorney for Plaintiff.

[Endorsed]: Filed August 4th, 1900. H. C. Flournoy, Clerk. By R. L. Erwin, Deputy Clerk.

State of California, }
County of Plumas. } ss.

I, H. C. Flournoy, county clerk of Plumas, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a full true, and correct copy of a notice of motion now on file in my office.

Witness my hand and seal of said Court, this the 20th day of August, 1900.

[Seal] H. C. FLOURNOY,

County Clerk and Ex-officio Clerk of the Superior Court.

[10c. Internal revenue stamp, hereto attached. Canceled.]

In the Superior Court of the County of Plumas, State of California.

THE COUNTY OF PLUMAS,
Plaintiff,

vs.

D. C. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Bond on Removal of Cause.

Know all men by these presents, that we, D. C. Wheeler and D. W. Ridenour, defendants in the above-entitled action as principals, and The United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., as surety, are held and firmly bound unto the county of Plumas a body politic and municipal corporation under the laws of the State of California, plaintiff in the above-entitled action in the sum of one thousand dollars ($1,000), lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, and each of us, our successors, heirs, executors, and administrators, jointly and severally by these presents.

The conditions of this obligation are such that, whereas, the said D. C. Wheeler and D. W. Ridenour have applied, or are about to apply, by petition to the Superior Court of the State of California, in and for the county of Plumas, for the removal of a certain cause therein pending, wherein the county of Plumas, a body politic and municipal corporation under the laws of the State of California, is plaintiff, and D. C. Wheeler and D. W. Ridenour, partners, doing business under the firm name and style of Wheeler and Ridenour, are defendants, to the Circuit Court of the United States, Ninth Circuit, for the Northern District of California, for further proceedings, on the grounds in said petition set forth, and that all further proceedings in the Superior Court in and for the county of Plumas be stayed:

Now, therefore, if your petitioners, said D. C. Wheeler and D. W. Ridenour, partners as aforesaid, shall enter in said Circuit Court of the United States, for the Northern District of California aforesaid, on or before the first day of the next regular session, a copy of the records in said suit, and shall pay, or cause to be paid, all costs that may be awarded therein by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

D. C. WHEELER.
D. W. RIDENOUR.

[Seal] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By Its Attorneys in Fact,
J. D. MAXWELL and
W. RIGBY.

Signed, subscribed, and sworn to this 1st day of August, 1900.

[Seal] MARCUS FREDRICK,

Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed August 4th, 1900. H. C. Flournoy, Clerk. By R. L. Erwin, Deputy Clerk.

State of California, }
County of Plumas. } ss.

I, H. C. Flournoy, county clerk of Plumas, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of a bond now on file in my office.

Witness my hand and seal of said Court, this the 20th day of August, 1900.

[Seal] H. C. FLOURNOY,

County Clerk and Ex-Officio Clerk of the Superior Court.

[10c. internal revenue stamp, hereto attached. Canceled.]

In the Superior Court of the State of California, in and for the County of Plumas.

THE COUNTY OF PLUMAS,
Plaintiff,

vs.

D. C. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Order Removing Cause to Circuit Court.

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant under the statutes of the United States, and on motion of Campbell & Metson, defendants' attorneys, it is ordered that the security offered by the defendants be accepted and said bond approved, and that the State court proceed no further in this cause, and that this cause be removed into the United States Circuit Court, Ninth Circuit, Northern District of California, State of California.

Dated August 11th, 1900.

C. E. McLAUGHLIN,
Judge.

[Endorsed]: Filed August 11th, 1900. H. C. Flournoy, Clerk.

State of California,
County of Plumas. } ss.

I, H. L. Flournoy, county clerk of Plumas, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of an order now on file in my office.

Witness my hand and seal of said Court, this the 20th day of August, 1900.

[Seal] H. C. FLOURNOY,

County Clerk and ex-officio Clerk of the Superior Court.

[10c. internal revenue stamp attached. Canceled.]

[Endorsed]: No. 12,972. United States Circuit Court, Ninth Judicial Circuit, Northern District of California. County of Plumas vs. D. C. Wheeler et al. Transferred Record. Filed August 28, 1900. Southard Hoffman, Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

COUNTY OF PLUMAS,

Plaintiff,

vs.

D. E. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,

Defendants.

Demurrer.

Come now the defendants above named and demur to plaintiff's complaint, and assign the following ground of demurrer:

That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray to be hence dismissed with their costs.

J. C. CAMPBELL,
W. H. METSON,
Attorneys for Defendants.

Northern District of California,
City and County of San Francisco, } ss.

J. C. Campbell, being first duly sworn, on oath says that he is one of the attorneys for the defendants in the above-entitled action; that the foregoing demurrer is not interposed for delay; that affiant makes this affidavit for the reason that defendants are absent from and now out of the city and county of San Francisco, wherein affiant resides.

J. C. CAMPBELL.

Subscribed and sworn to before me this 7th day of September, 1900.

[Seal] HOLLAND SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Dated September 7th, 1900.

J. C. CAMPBELL,
Attorneys for Defendants.

[Endorsed]: Filed September 7, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 25th day of November, in the year of our Lord one thousand nine hundred and one. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

THE COUNTY OF PLUMAS,
vs.
D. C. WHEELER et al., } No. 12,972.

Order Overruling Demurrer.

Defendants' demurrer to the complaint herein, heretofore heard and submitted, having been fully considered, it was ordered that said demurrer be and hereby is overruled, in accordance with the oral opinion of the Court this day delivered, with leave to defendants to answer within twenty days.

At a stated term, to wit, the March term A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Friday, the 7th day of March, in the year of our Lord, one thousand nine hundred and two. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

THE COUNTY OF PLUMAS, Plaintiff,
vs.
D. C. WHEELER et al., Defendants.
} No. 12,972.

Order for Default and Judgment for Plaintiff.

In this cause the Court having, upon the 25th day of November, 1901, overruled defendants' demurrer to the complaint of plaintiff, with leave to defendants to answer said complaint within twenty days; and said time for answering having expired, and not having been extended, and said defendants having failed to answer the complaint herein, now, upon motion of Frank R. Wehe, Esq., on behalf of U. S. Webb, Esq., attorney for plaintiff, it is ordered that the default of the defendants D. C. Wheeler and D. W. Ridenour, partners doing business under the firm name and style of Wheeler & Ridenour, be and hereby is entered herein; and it is further ordered that judgment be entered herein in favor of plaintiff and against the defendants, in accordance with the prayer of plaintiff's complaint and for costs.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE COUNTY OF PLUMAS,
Plaintiff,

vs.

D. C. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

No. 12,972.

Judgment.

In this cause the Court having, upon motion of Frank R. Wehe, Esq., upon behalf of U. S. Webb, Esq., attorney for plaintiff, ordered that the default of the defendants be entered for failure to file an answer to the complaint within the time allowed by the Court after the overruling of said defendants' demurrer to the complaint; and said default having been entered, and the Court having thereupon ordered that judgment be entered in favor of the plaintiff and against the defendants, in accordance with the prayer of the complaint herein and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the county of Plumas, plaintiff, do have and recover of and from D. C. Wheeler and D. W. Ridenour, partners

doing business under the firm name and style of Wheeler & Ridenour, defendants, the sum of two thousand one hundred and fifty dollars, together with its costs in this behalf expended, taxed at $25.80.

Judgment entered March 7th, 1902.

SOUTHARD HOFFMAN,
Clerk.

A true copy:

[Seal] Attest: SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed March 7, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

COUNTY OF PLUMAS,
vs.
D. C. WHEELER et al., } No. 12,972.

Certificate to Judgment-Roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 7th day of March, 1902.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Judgment-roll. Filed March 7, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

COUNTY OF PLUMAS,
Plaintiff,

vs.

D. E. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Petition for Writ of Error and Supersedeas.

D. E. Wheeler and D. W. Ridenour, defendants above named, feeling themselves aggrieved by the judgment of

the above-entitled court, entered herein on the 7th day of March, 1902, come now and petition said Court for an order allowing said defendants to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount or security which the said defendant shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants.

[Endorsed]: Filed April 4, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF PLUMAS,
Plaintiff,

vs.

D. E. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

No. 148.

Assignment of Errors.

Afterward come D. E. Wheeler and D. W. Ridenour, defendants above named, and say in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

I.

That the complaint of plaintiff above named in the said action does not state facts sufficient to constitute a cause of action against said defendant.

II.

That the above-entitled Court erred in making and entering on, to wit, the 25th day of November, 1901, that certain minute order wherein and whereby the demurrer of said defendants to the complaint was overruled.

III.

That said Court erred in making and entering, on, to wit, the 7th day of March, 1902, its order that the default of said defendant be entered for failure to file an answer to said complaint within the time allowed by said Court after the overruling of said defendant's demurrer to said complaint.

IV.

That said Court erred in giving, making and entering its certain judgment in said action that said plaintiff do have and recover from said defendants the sum of two thousand one hundred and fifty dollars, together with its costs in such behalf expended.

V.

That said Court erred in giving, making and entering in said action its judgment in favor of said plaintiff and against said defendants.

Wherefore, said defendants pray that said judgment of said Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California, be reversed, and that said Court be ordered to make and enter its judgment that said plaintiff take nothing by its said action, but that said defendants be thence dismissed with judgment for their costs in such behalf expended.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants.

[Endorsed]: Filed April 4, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the February term, A. D. 1902, of the Circuit Court of the United States, Ninth Circuit, Northern District of California, held at the courtroom thereof, in the city of San Francisco, on the 4th day of April, in the year of our Lord one thousand nine hundred and two.

COUNTY OF PLUMAS,
Plaintiff,

vs.

D. E. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Order Allowing Writ of Error.

Upon motion of the defendants above named, and upon filing a petition for a writ of error and an assignment of errors herein—

It is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgments heretofore entered herein.

Dated this 4th day of April, 1902.

WM. W. MORROW,
Judge.

[Endorsed]: Filed April 4th, 1902. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF PLUMAS,
Plaintiff,

vs.

D. E. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Order Fixing Amount of Bond and Supersedeas.

The defendants above named having this day filed their petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendants should give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of

error by the said United States Circuit Court of Appeals in and for the Ninth Circuit, and said petition having this day been duly allowed—

Now, therefore, it is ordered that upon the said defendants filing with the clerk of this court a good and sufficient bond in the sum of $3,000, to the effect that if the said defendants and plaintiffs in error shall prosecute the said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Court that all proceedings in this Court be, and the same are hereby, suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 4th day of April, 1902.

WM. W. MORROW,

Judge.

[Endorsed]: Filed April 4, 1902. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF PLUMAS,
Plaintiff,

vs.

D. E. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

Bond on Writ of Error.

Know all men by these presents, that we, D. E. Wheeler and D. W. Ridenour, and the United States Fidelity and Guaranty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the plaintiff above named, in the sum of three thousand (3,000) dollars, to be paid to the said plaintiff, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated this 4th day of April, 1902.

Whereas, the above-named defendants have sued out a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment in the above-entitled case by the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute said writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

D. E. WHEELER and [Seal]
D. W. RIDENOUR, [Seal]
By J. C. CAMPBELL,
Attorney.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

By Its Attorney in Fact,
[Corporate Seal] JOHN H. ROBERTSON.

Whereas, The United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, has deposited with me its charter or articles of incorporation and the statement required by Section 3 of an Act of Congress approved August 13, 1894, and entitled "An Act Relative to recognizances, stipulations, bonds, and undertakings and to allow certain corporations to be accepted as surety thereon"; and has satisfied me that it has authority under its charter to do the business provided for in said Act, that it has a

paid-up capital of not less than $250,000.00 in cash or its equivalent, and that it is able to keep and perform its contracts;

Now, therefore, the said United States Fidelity and Guaranty Company is hereby granted authority to do business under said Act in said State of Maryland and is also granted authority to do business under said Act beyond the limits of said State in any Judicial District of the United States in which it shall first have appointed an agent conformably to the provisions of Section 2 of said Act.

HOLMES CONRAD,
Acting Attorney-General.

Department of Justice, Washington, D. C., September 25, 1896.

[Department Seal]

DEPARTMENT OF JUSTICE.

Washington, D. C., Dec. 7, 1901.

The annexed is a true copy of an original authorization to do business, issued by the Attorney-General, under the Act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

[Seal] CECIL CLAY,
Chief Clerk.

STATEMENT

of

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

Rendered to the Department of Justice, Washington, D. C.

At the Close of Business, March 31st, 1902.

Commenced Business August 1st, 1896.

ASSETS.

Investments, Stocks and Bonds (Market Value)	$1,326,479.85
Cash on Hand and in Banks	398,335.42
Collateral Loans	570,894.00
Real Estate	130,629.58
Loans Secured by Mortgages	22,000.00
Mortgages and other Collateral a|c Salvage	14,599.61
Advanced a|c Contracts Secured	37,958.99
Agents' Balances, Fidelity and Surety, Less Commissions	176,965.94
Agents' Balances, Burglary, Less Commissions	29,277.91
Due for Subscriptions Department of Guaranteed Attorneys	24,752.14
Interest Due and Accrued	19,790.04
	$2,751,683.48

LIABILITIES.

Capital Stock Paid in Cash	$1,500,000.00
Cash Collateral Deposits	148,087.38
Surplus and Reserve	1,103,596.10
	$2,751,683.48

JOHN R. BLAND,
President.

GEORGE R. CALLIS,
Secretary.

State of Maryland, }
City of Baltimore. } ss.

On this 7th day of April, 1902, before me, A. D. Patrick, a Notary Public in and for the City and State aforesaid, appeared John R. Bland and George R. Callis, President and Secretary respectively, of The United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say that they are such Officers of the said Company, and that the above and foregoing is a full, true and correct statement of the Assets and Liabilities of the said Company, as they appeared upon the books of the said Company on the 31st day of March, A. D. 1902.

In Witness Whereof, I have hereunto set my hand and official seal, the day and year aforesaid.

[Notarial Seal]

A. D. PATRICK,
Notary Public.

Form 400

FORM OF AFFIDAVIT, ACKNOWLEDGMENT AND JUSTIFICATION BY GUARANTY OR SURETY COMPANY.

State of California,
City and County of San Francisco. } ss.

On this 4th day of April, one thousand nine hundred and two (1902), before me personally came John H. Robertson, known to me to be the attorney in fact of The United States Fidelity and Guaranty Company, a corporation described in and which executed the annexed bond of Wheeler & Ridenour, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of San Francisco, State of California, that he is the attorney in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (Form ———) of Wheeler and Ridenour is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like

order and authority as attorney in fact of said company; and that John H. Robertson is the duly authorized agent and attorney of said The United States Fidelity and Guaranty Company, to accept service of the process in the Northern Judicial District of the State of California, and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of one million five hundred thousand dollars ($1,500,000.-00).

JOHN H. ROBERTSON.

Sworn to, acknowledged before me, and subscribed in my presence this 4th day of April, 1902.

[Seal] W. B. HARDING,

Notary Public in and for the City and County of San Francisco, Cal.

[Endorsed]: The within bond is approved.

WM. W. MORROW,

Judge.

Filed April 5th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE COUNTY OF PLUMAS,
Plaintiff,

vs.

D. E. WHEELER and D. W. RIDENOUR, Partners, Doing Business Under the Firm Name and Style of WHEELER & RIDENOUR,
Defendants.

No. 12,972.

Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 36, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing transcript of record is $21.25; that said amount was paid by the defendants' attorneys, and that the original writ of error and citation issued herein are hereto annexed.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Circuit Court, this 3d day of May, A. D. 1902.

[Seal] SOUTHARD HOFFMAN,

Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting.

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court. before you, or some of you, between D. E. Wheeler and D. W. Ridenour, partners, doing business under the firm name and style of Wheeler & Ridenour (defendants), plaintiffs in error, and county of Plumas (plaintiff), defendant in error, a manifest error hath happened, to the great damage of the said D. E. Wheeler and D. W. Ridenour, partners, doing business under the firm name and style of Wheeler and Ridenour, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 5th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 5th day of April, in the year of our Lord one thousand nine hundred and two.

[Seal] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by:

WM. W. MORROW,
Judge.

Service of the within writ and receipt of a copy thereof is hereby admitted this 12th day of April, 1902.

N. S. WEBB,
Attorney for Defendants.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: No. 12,972. Circuit Court of the United States, Ninth Circuit, Northern District of California. D. E. Wheeler et al., Plaintiffs in Error, vs. County of Plumas, Defendant in Error. Writ of Error. Filed April 17, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to County of Plumas, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 5th day of May next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, North-

ern District of California, in a certain action numbered 12,972, wherein D. E. Wheeler and D. W. Ridenour, partners, doing business under the firm name and style of Wheeler & Ridenour are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 5th day of April, A. D. 1902.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this 12th day of April, 1902.

N. S. WEBB,
Attorney for Defendants.

[Endorsed]: No. 12,972. Circuit Court of the United States, Ninth Circuit, Northern District of California. D. E. Wheeler et al., Plaintiffs in Error, vs. County of Plumas, Defendant in Error. Citation. Filed April 17, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 833. In the United States Circuit Court of Appeals for the Ninth Circuit. D. E. Wheeler and D. W. Ridenour, Partners Doing Business Under the Firm Name and Style of Wheeler & Ridenour, Plaintiffs in Error, vs. The County of Plumas, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filed May 5, 1902.

F. D. MONCKTON,

Clerk.

No. 833.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

D. E. WHEELER and D. W. RIDENOUR, partners doing business under the firm name and style of Wheeler & Ridenour,

Plaintiffs in Error,

vs.

THE COUNTY OF PLUMAS,

Defendant in Error.

Brief for Plaintiffs in Error

A. E. CHENEY,
J. C CAMPBELL,
W. H. METSON,
Attorneys for Plaintiffs in Error

Percy Publishing Co., Law and Commercial Printers, San Francisco

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

D. E. WHEELER and D. W. RIDENOUR, partners doing business under the firm name and style of Wheeler & Ridenour,

Plaintiffs in Error,

vs.

THE COUNTY OF PLUMAS,

Defendant in Error.

No. 833.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This cause comes before this Honorable Court on writ of error, prosecuted to review a judgment of the Circuit Court, Ninth Circuit, Northern District of California, entered therein on the default of defendants (here plaintiffs in error) after demurrer overruled by the Hon. W. W. Morrow, the Judge of that Court.

The action was prosecuted by the County of Sierra, a county of the State of California, and a body politic and corporate under the laws thereof, against these plaintiffs in error, citizens of the State of Nevada, to

recover a certain tax authorized by ordinance of that county, which purported to levy "a license tax on per- " sons, firms, co-partnerships and corporations, carrying " on the business of raising, grazing, herding or pas- " turing sheep or lambs within the County of Plumas, " and providing for the collection of the same." (Record p. 2.)

This ordinance, so far as material to our argument is as follows:

"Sec. 1. Every person, firm, co-partnership or cor- " poration, engaged in the business of raising, grazing, " herding or pasturing sheep or lambs within the " County of Plumas, State of California, must annually " procure a license therefor from the license collector of " said county and shall pay therefor the sum of $10 for " each one hundred sheep or lambs owned by, in the " possession or under the control of such person.

"Sec. 2. Each and every person, co-partnership, " firm or corporation, who may engage in the business " of raising, grazing, herding or pasturing sheep or " lambs within the County of Plumas, State of Califor- " nia, in order to procure a license therefor, must pre- " sent to the license collector of Plumas County at the " time of making application therefor, an affidavit show- " ing the number of sheep and lambs owned by, in the " possession of, and under the control of such applicant " for license within the County of Plumas, and upon " presenting such affidavit and the payment of the " license tax, as prescribed in Section 1 of this ordin- " ance, the applicant shall be granted a license to graze,

" herd or pasture sheep or lambs within the County of " Plumas.

"Sec. 5. The county auditor shall prepare and " have printed suitable blank licenses for the license " collector to carry out the provisions of this ordinance, " with blank receipts for the license collector when sold.

"Sec. 6. The license collector shall collect a fee of one dollar for each license sold, which shall be paid into the salary fund of the county.

"Sec. 7. All money collected for license under the " provisions of this ordinance shall be paid over to the " county treasurer, as other moneys are, and placed to " the credit of the general fund of the county.

"Sec. 8. The license to be collected under this ordin- " ance is a debt owing to the County of Plumas; and " shall become due and payable to said county in ad- " vance at the office of the license collector of said " county."

The plaintiffs in error during the months of May and June were engaged in the business of raising, grazing, herding and pasturing sheep, and lambs in that county, and had in their possession and under their control 21,000 head (p. 6). They did not procure a license nor pay the tax as required by the ordinance (p. 7). This action was accordingly brought under the ordinance for $2100, as owing the defendant in error, and $50.00 damages (p. 7).

The defendants (plaintiffs in error) demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action (p. 22). The

Court overruled the demurrer with leave to answer (p. 24). The defendants failed to answer, and upon their default judgment was entered against them for the sum of $2150 and costs (p. 27). This is the judgment now sought to be reviewed.

Assignment of Error.

The plaintiff in error relies upon the following assignment of error for the purpose of this argument:

I.

The complaint does not state facts sufficient to constitute a cause of action.

II.

The Court erred in making and entering an order overruling the demurrer to the complaint.

III.

The Court erred in giving, making and entering judgment for plaintiff and against defendant.

By stipulation of counsel this cause is submitted upon the briefs for plaintiff in error in that certain cause entitled "*P. L. Flanigan*, plaintiff in error, v. *The County of Sierra*, defendant in error", and numbered 832, now pending in this Court.

Respectfully submitted,

A. E. CHENEY,

J. C. CAMPBELL,

W. H. METSON,

Attorneys for plaintiffs in error.

No. 833.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

D. E. WHEELER and D. W. RIDENOUR, partners doing business under the firm name and style of Wheeler & Ridenour,
Plaintiffs in Error,

vs.

THE COUNTY OF PLUMAS,
Defendant in Error.

Brief for Defendant in Error.

U. S. WEBB,
Attorney for Defendant in Error.

Perkins Print[illegible] and Copying.

IN THE

United States Circuit Court of Appeals

For The Ninth Circuit.

D. E. WHEELER and D. W. RIDENOUR, partners doing business under the firm name and style of WHEELER & RIDENOUR, Plaintiffs in Error, vs. THE COUNTY OF PLUMAS, Defendant in Error.	No. 833.

BRIEF FOR DEFENDANT IN ERROR.

This case presents the same question as that presented for decision in *P. L. Flanigan, Plaintiff in Error*, vs. *The County of Sierra, Defendant in Error*, numbered 832 in this Court, in which latter case two briefs on behalf of plaintiff in error therein are on file, one by A. E. Cheney, Esq., and one by Messrs. A. E. Cheney, J. C. Campbell, W. H. Metson and Campbell, Metson & Campbell, attorneys for plaintiff in error in that case and in this.

The latter brief fairly states the facts material to this hearing, except that it is inadvertently stated that "the Court overruled the demurrer with leave to amend"

(p. 4). The demurrer was overruled with leave to *answer*.

It might also be added to the statement of facts that prior to the bringing of this action Plumas county made proper demand of defendant (plaintiff in error) that claim be paid, and that sections 3 and 4 of the ordinance are omitted, and are material.

Both of the briefs, above referred to, are answered by the brief of Mr. Frank R. Wehe, attorney for defendant in error, in said case No. 832, and by stipulation of the parties herein that brief is to stand as the brief of defendant in error in this case, and for the reasons therein stated I respectfully submit that the judgment of the Circuit Court be affirmed.

U. S. WEBB,
Attorney for Defendant in Error.

No. 833.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

D. E. WHEELER, and D. W. RIDENOUR, partners, doing business under the firm name and style of Wheeler & Ridenour,

Plaintiff in Error,

vs.

THE COUNTY OF PLUMAS,

Defendant in Error.

Petition for a Rehearing.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Plaintiffs in Error.

THOMAS H. BREEZE,
Of Counsel.

THE STAR PRESS—JAMES H. HARRY

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

D. E. WHEELER and D. W. RIDENOUR, partners, doing business under the firm name and style of Wheeler & Ridenour,

Plaintiffs in Error,

vs.

THE COUNTY OF PLUMAS,

Defendant in Error.

PETITION FOR REHEARING.

The plaintiffs in error herein now petition for a rehearing of this writ of error upon the same grounds as stated in the petition for a rehearing now on file in that certain cause numbered 832 and entitled *P. L. Flanigan,* Plaintiff in Error, vs. *The County of Sierra,*

Defendant in Error, and respectfully submit their petition upon the argument therein contained.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Plaintiffs in Error.

THOMAS H. BREEZE,
Of Counsel.

I hereby certify that the above and foregoing petition for a rehearing in my judgment is well founded, and is not interposed for delay.

JOSEPH C. CAMPBELL,
Of Counsel for Plaintiffs in Error.

No. 834

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

FRED KOSTERING,
Appellant,

vs.

SEATTLE BREWING AND MALTING COMPANY (a Corporation),
Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Northern District of California

THE FILMER BROTHERS CO. PRINT, 424 SANSOME ST., S. F.

INDEX.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.
No. 13,219.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

Seattle Brewing and Malting Company, which is a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its principal place of business at the city of Seattle in the State of Washington, files this, its bill of complaint, against Fred Kostering, who is a citizen of the United States and a resident of the Northern Judicial District of the State of California, and thereupon your orator complains and says:

First.—That for upwards of eight years last past it has been, and now is, engaged in the business of producing, manufacturing and brewing beer at the city of Seattle in the State of Washington, under its corporate name of Seattle Brewing and Malting Company, and that said beer so as aforesaid produced, manufactured and brewed by your orator has been during all of said time, and still

is, known and designated by the trade name of "Rainier Beer." That for upwards of three years last past your orator has been engaged in shipping large quantities of said beer to the city and county of San Francisco and other places within the State of California for the purpose of sale in the said city and county of San Francisco and other places in the State of California, and that a large portion of said beer so sold by your orator in said city and county of San Francisco and other places in the State of California has been, by your orator, bottled in certain dark glass bottles. That upon each of said bottles there has been fixed by your orator a peculiarly colored label, the design and color of which said label will more fully appear by the specimen of your orator's beer, bottled by it, which is herewith filed and marked Complainant's Exhibit "A," and a true and correct copy of which said label is as follows, to wit:

That the said trade name of "Rainier Beer" and the said devices upon said label have been applied to the said beer of your orator continuously since the year 1893, and the said trade name of "Rainier Beer" and the devices upon said label have long since, through user, become and now are indicative of the origin and ownership of the said beer of your orator.

That the said trademark is of the value of fifty thousand dollars ($50,000.00) and upwards.

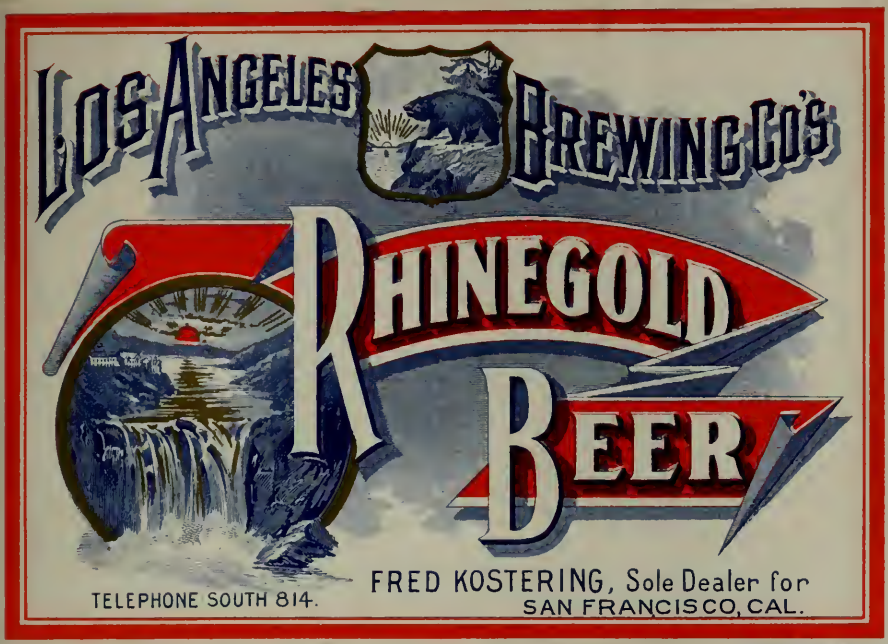
That your orator's use of said trademark last aforesaid has been continuous, uninterrupted, quiet and undisturbed, and has been acquiesced in throughout the world until the commission of the fraudulent acts of the defendant hereinafter complained of.

Second.—That by reason of the long experience and great care of the complainant in its said business, and of the good quality of the said beer so as aforesaid produced, manufactured, brewed and bottled by it as aforesaid, and distinguished as it is by the said tradename of your orator and the label shown upon Complainant's Exhibit "A," the said beer has become widely known throughout the Pacific States and Territories, and especially in the States of Washington, Oregon, California and Nevada, as a useful and valuable beverage, and has acquired and now has a high reputation as such, and has commanded and still commands an extensive sale throughout the Pacific States and Territories of the United States, and especially in the States of Washington, Oregon, California and Nevada, which is and has been a source of great profit to said complainant; and

that said beer, when bottled by said complainant as aforesaid, is known as such beer to the public and to the buyers and consumers thereof by the said label above described upon Complainant's Exhibit "A," and by the said tradename of "Rainier Beer."

Third.—That the defendant, Fred Kostering, is now and at all times hereinafter mentioned was engaged in business in the city and county of San Francisco, State of California, in bottling and selling beer.

Fourth.—Your orator further says that the said defendant, in violation of the trademark rights of your orator, has, in the said city and county of San Francisco and elsewhere in the State of California, prepared, bottled and sold beer not bottled by your orator, but bearing a label which is a colorable imitation of the trademark of your orator, shown upon and contained in the label upon Complainant's Exhibit "A," which said label so as aforesaid used by said defendant will more fully appear by reference to the specimen of the said spurious beer bottled and sold by the defendant, which is herewith filed and marked Complainant's Exhibit "B," and a true and correct copy of which said last-named label is as follows, to wit:



And your orator avers that the said label shown upon Complainant's Exhibit "B" is substantially identical in form and color with the form and color used by your orator upon the bottles containing the said "Rainier Beer" of your orator, as shown in the label upon Complainant's Exhibit "A." That said label of the defendant shown upon said exhibit "B" is calculated to deceive and mislead the public into the belief that the beer sold by the defendant under said label is the "Rainier Beer" of your orator; and further in this behalf complaining, your orator avers that one element of the wrong being committed by the defendant in fraud of your orator's trademark rights is his use upon said

label, shown in Complainant's Exhibit "B," of the words "Rhinegold Beer" and the picture of a landscape, and the arrangement of the words and devices upon said label. shown upon Complainant's Exhibit "B," in substantially the same form and arrangement and in substantially the same colors as the words and devices upon the said label upon Complainant's Exhibit "A," which said last-named label, together with the words and devices thereon, and the arrangement thereof, as applied to beer, are the sole and exclusive property of your orator, and have so been your orator's exclusive property for upwards of eight years last past. That the said use by the said defendant is calculated to deceive and mislead the public into the belief that the beer sold under the said infringing trademark is the beer of your orator. That the defendant's use of the words and devices, and the manner of their arrangement, and the color in which they are printed upon the label shown upon Complainant's Exhibit "B," is and has always been in fraud of your orator's rights and without the license, permission, privity, procurement, or consent of your orator. And your orator further avers that the defendant's said label, as shown upon Complainant's Exhibit "B," infringes both upon the trademark rights of your orator in and to the words and devices, and the manner of their arrangement, and the colors in which they are printed, shown upon the label in Complainant's Exhibit "A," and is a further infringement of your orator's trademark rights in and to the words "Rainier Beer."

Fourth.—And your orator respectfully represents that the defendant, well knowing of your orator's trademark rights, and of your orator's use of the label shown upon Complainant's Exhibit "A," as also used in connection with and affixed to bottles of the character shown in Complainant's Exhibit "A," has wrongfully and fraudulently instituted and carried on and is now carrying on an unfair and fraudulent competition against your orator, in violation of your orator's rights, by knowingly, wilfully, wrongfully and fraudulently exposing for sale and selling in the city and county of San Francisco, State of California, and elsewhere, a spurious beer, contained in bottles bearing an imitation of your orator's trademark, as above described, and otherwise simulating your orator's packages by the use of labels presenting the same general appearance to the eye as your orator's label shown upon Complainant's Exhibit "A," and by the use of bottles similar in size, shape and color, and general appearance to the eye as that shown by Complainant's Exhibit "A," and by means of all of these said tricks and devices the defendant has attempted and is now attempting to pass off his beer upon the public as and for the beer of your orator. That your orator's rights thus invaded by the defendant are of the value of fifty thousand dollars ($50,000.00) and upwards.

Fifth.—In consideration whereof, and forasmuch as your orator is remediless in the premises except in this Court, and cannot have adequate relief save by the aid and interposition of this Honorable Court, to the end, therefore, that the said defendant may, if he can, show

why your orator should not have the relief hereby prayed for, and may make a full disclosure and discovery under oath of all the matters aforesaid, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true and perfect answer make, under oath, to the matters hereinbefore stated and charged and to the interrogatories hereinafter numbered and set forth; and that the defendant may be decreed to account for and pay over the income or profits thus unlawfully derived from the violation of your orator's rights, your orator prays that your Honors may grant a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining the defendant, his clerks, agents, attorneys; servants and employees, from keeping, offering for sale, or selling any beer not being the beer produced, manufactured, brewed or bottled by your orator, put up in bottles of the general form, shape and color of your orator's bottles and containing the label of the form, device and shape shown in Complainant's Exhibit "A," or in any other form, device or shape which shall be a colorable imitation of your orator's label, and perpetually enjoin and restrain the defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by your orator, under or bearing the label of or designated by the words "Rhinegold Beer," or the words or devices, or the manner of their arrangement, or the color of their printing, shown upon the label upon Complainant's Ex-

hibit "B," or any word or symbol calculated to deceive or mislead the public into the belief that the defendant's beer is the beer of your orator; and that the said defendant deliver up to your orator all bottles having thereon the said false labels, and also all such false labels in his possession or under his control, to the end that the same may be destroyed.

And that your Honors, upon the rendering of the decree above prayed, may assess or cause to be assessed, in addition to the profits to be accounted for by the defendant as aforesaid, the damages your orator has sustained by reason of the premises.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Fred Kostering, commanding him, on a day certain to appear and answer to this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

MILTON S. EISNER,
Solicitor for Complainant.

Interrogatories to be propounded unto the said defendant, and to be answered by the said defendant:

Interrogatory No. 1. Whether or not, if you have used the label shown upon Complainant's Exhibit "B," or if you have applied the words "Rhinegold Beer" and the picture of a landscape with the words and devices shown upon the label upon said Complainant's Exhibit "B," ar-

ranged in substantially the same form and printed in substantially the same colors as the words and devices upon the label upon Complainant's Exhibit "A," to beer not being the beer of the complainant? If yea, how many bottles bearing said labels have you sold, and when and to whom did you sell them, and what price did you receive for the same?

Interrogatory No. 2. What profits have you made or realized on each sale made by you of beer, bearing the devices shown upon the Complainant's Exhibit "B," or any similar devices.

MILTON S. EISNER,
Solicitor for Complainant.

State of California,
City and County of San Francisco. } ss.

E. F. Sweeney, of said city and county, having been duly sworn, deposes and says that he is the vice-president and general manager of Seattle Brewing and Malting Company, a corporation, the complainant herein and for that reason makes this affidavit for and on behalf of said complainant in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

E. F. SWEENEY.

Subscribed and sworn to before me, this 27th day of March, A. D. 1902.

[Seal] JAMES M. ELLIS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed March 28, 1902. Southard Hoffman, Clerk.

Subpoena Ad Respondendum.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

The President of the United States of America, Greeting, to Fred Kostering:

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the fifth day of May, A. D. 1902, to answer a bill of complaint exhibited against you in said Court by Seattle Brewing and Malting Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, The Honorable MELVILLE W. FULLER, Chief Justice of the United States this 28th day of

March, in the year of our Lord one thousand nine hundred and two, and of our Independence the 126th.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]:

United States of America,
Northern District of California. } ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein-named Fred Kostering by handing to and leaving a true and correct copy thereof with Fred Kostering, personally, at San Francisco, in said District, on the 28th day of March, A. D. 1902.

JOHN H. SHINE,
United States Marshal.
By E. A. Morse,
Office Deputy.

Filed March 29, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation),
Complainant,

vs.

FRED KOSTERING,
Defendant.

Order to Show Cause, etc.

On reading and filing the verified bill of complaint of the above-named complainant, and good cause appearing therefrom, it is ordered that the defendant above-named be and appear before this Court, at the courtroom thereof, in the Appraisers' Building, in the city and county of San Francisco, State of California, on Monday, the 7th day of April, 1902, at the hour of eleven o'clock A. M., then and there to show cause, if any he has, why a writ of injunction should not be issued in the above-entitled suit, enjoining and restraining the said defendant, his attorneys, servants, agents, and employees, and each of them, until the further order of this Court, from keeping, offering for sale, or selling any beer not being the beer produced, manufactured, brewed or bottled by the complainant, put up in bottles of the general form,

shape and color of the complainant's bottles, and containing the label of the form, device and shape shown in Complainant's Exhibit "A," filed with said bill of complaint, or in any other form, device or shape which shall be a colorable imitation of complainant's said label, and enjoining and restraining said defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by said complainant under or bearing the label of or designated by the words "Rhinegold Beer," or of the words or devices, or the manner of their arrangement, or the color of their printing, shown upon the label upon Complainant's Exhibit "B," filed with said bill of complaint or any word or symbol calculated to deceive or mislead the public into the belief that said defendant's beer is the beer of said complainant.

And on the hearing of this order to show cause the said complainant may use, read and refer to the said verified bill of complaint, and to the said exhibits "A" and "B" filed therewith, and may use, read and refer to such other evidence, either oral or documentary, as may be produced upon the hearing of said order, or which may be required by this Court on the hearing thereof.

And it is further ordered that a copy of the said verified bill of complaint be served upon said defendant in this case at least five (5) days prior to the return day.

Dated San Francisco, Cal., March 28, 1902.

WM. W. MORROW,
Judge.

[Endorsed]:

United States of America,
Northern District of California. } ss.

I hereby certify and return that I served the annexed order to show cause on the therein-named Fred Kostering, by handing to and leaving a true and correct copy thereof with Fred Kostering, together with a copy of the bill of complaint therein named attached thereto, personally, at San Francisco, in said District, on the 28th day of March, A. D. 1902.

JOHN H. SHINE,
United States Marshal.
By E. A. Morse,
Office Deputy.

Filed March 29, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

SEATTLE BREWING & MALTING COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.

Affidavit on Order to Show Cause Why Defendant Should not be Restrained, Etc.

State of California,
City and County of San Francisco. } ss.

Fred Kostering, being first duly sworn, says: That he is the defendant in the above-entitled action.

That the Los Angeles Brewing Company is a corporation duly incorporated and existing under and by virtue of the laws of the State of California, with its principal place of business at the City of Los Angeles in said State of California.

That said Los Angeles Brewing Company for upwards of ten years last past has been, and now is, engaged in the business of producing, manufacturing and brewing beer at the city of Los Angeles in the State of California under its corporate name of Los Angeles Brewing Company.

That in the month of February, 1902, this defendant obtained the right of bottling and selling the said beer so produced, manufactured and brewed by the said Los

Angeles Brewing Company in the city and county of San Francisco.

That thereupon this affiant erected beer bottling works at No. 1034 Harrison street, in said city and county, and commenced bottling and selling the beer of said Los Angeles Brewing Company on the 9th day of March, 1902.

That affiant thereupon selected the name "Rhinegold" as the name of the beer of the said Los Angeles Brewing Company, to be bottled and sold by him, and ordered of said Los Angeles Brewing Company a label which would distinguish the beer brewed by it and bottled and sold by affiant from any and all other beers wheresoever and by whomsoever brewed and bottled.

That thereupon affiant received from said Los Angeles Brewing Company the label marked Complainant's Exhibit "B" in complainant's bill of complaint.

That immediately after receiving said label affiant filed with the Secretary of State of the State of California, at Sacramento, the capital of said State, affiant's claim to the said label as a trademark, with a fac-simile and description of such trademark and label, and with his affidavit attached thereto, certified to by a notary public of the city and county of San Francisco, State of California, setting forth that he, this affiant, was the exclusive owner of said trademark and label.

That thereupon, to wit, on the 19th day of March, 1902, the Honorable C. F. Curry, Secretary of State of the State of California, issued to this affiant a certificate in the words and figures following, to wit:

"No. 323. State of California, Department of State. I, C. F. Curry, Secretary of State of the State of California, do hereby certify that Fred Kostering, located and doing business in the city and county of San Francisco, State of California, and being engaged in the business of bottling beer, duly filed in this office on the 19th day of March, A. D. 1902, a claim to trademark, to be used in connection with beer.

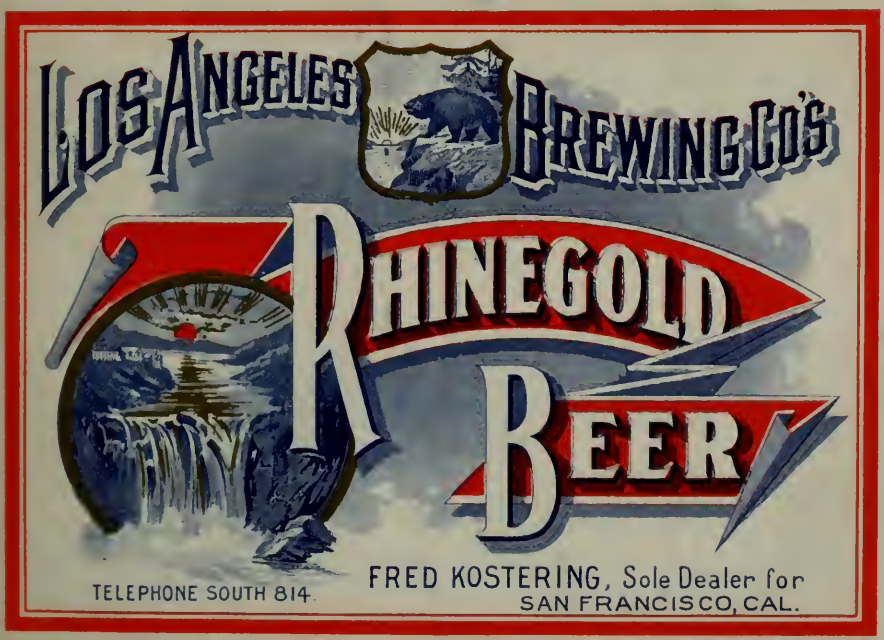
"Said Trademark consists of the word 'Rhinegold' together with pictures and design as shown on label to claim to trademark, a description of which is more fully set forth in the specification attached to and made a part of the claim to trademark above referred to. Witness my hand and the Great Seal of the State of California; at office in Sacramento, this 19th day of March, A. D. 1902.

[Great Seal] C. F. CURRY,
Secretary of State.
By J. Hoesch,
Deputy."

That the following is the description set forth in the specification attached to and made a part of the said claim to said trademark referred to, to wit:

"My trademark consists of the word 'Rhinegold.' This has generally been arranged as shown in the accompanying fac-simile. The words 'Los Angeles' in blue letters are in the upper left-hand corner, and the words 'Brewing Co's' in the same color, are in the upper right hand corner. Between the words 'Los Angeles' and 'Brewing Co's' is a shield with a gilt border, the field

thereof containing a representation of a bear standing upon a rocky promontory upon which there is a fir tree, the Golden Gate with a setting sun with golden rays, in the distance. The center of the trademark contains a waving vermilion-red streamer with white border and blue background, upon the upper fold of which, in white letters, is the word 'Rhinegold,' the 'R' of which intersects a gilt encircled seal in the lower left hand corner, containing a representation of the river Rhine ending in falls, with rocky cliffs; upon the waters of the river are reflected the golden rays of a vermilion-red sun disappearing behind the hills; upon the lower fold of the streamer is the word 'Beer,' also in white letters. The whole trademark is surrounded by a vermilion-red border, as shown by the following fac-simile, to wit:



This trademark I have used in my business since the 10th day of March, 1902.

The class of merchandise to which the trademark is appropriated is beer, brewed by the Los Angeles Brewing Company, a corporation incorporated and existing under and by virtue of the laws of the State of California with its principal place of business at Los Angeles.

Other forms of type may be employed, or they may be differently arranged or colored, without materially altering the character of the trademark, the essential features of which are the words 'Rhinegold,' the shield with bear upon the promontory, and the river scene as shown in the foregoing fac-simile.

It is my practice to apply my trademark to the bottles containing the beer by means of suitable labels on which it is printed in colors as above described."

Affiant further says that he uses the said label upon bottles in which beer is ordinarily and generally bottled, and in which it has been the custom to bottle it for more than thirty years last past; that upon the bottles so used by him there are blown the words "Los Angeles Brewing Co., San Francisco," and affiant's monogram "F. K."

That it is not true that the said label of defendant is calculated to deceive or mislead the public into the belief that the beer sold by him under said label is the "Rainier" beer of complainant; that the object of placing affiant's label upon the beer bottled by him is to inform the public that the said beer is beer brewed by the Los Angeles Brewing Company, and bottled by affiant, and not beer brewed by the Seattle Brewing & Malting

Company, and sold by complainant under the name "Rainier."

And this affiant further states that it is not true that his said label infringes upon the trademark rights of said complainant or in or to the words or devices or the manner of their arrangements or the color in which they are printed or that the same is an infringement of complainant's trademark rights in or to the words "Rainier" beer;

Affiant further states that it is not true that he has wrongfully or fraudulently instituted or carried on or is now carrying on an unfair or fraudulent competition against said complainant in violation of plaintiff's rights by exposing for sale or selling in the city and county of San Francisco, State of California, or elswhere, a spurious beer contained in bottles bearing an imitation of complainant's trademark or otherwise simulating complainant's packages by the use of labels presenting the same general appearance to the eye as complainant's label or by the use of bottles similar in size, shape and color and general appearance to the eye as that shown by complainant's label; or that by means of any trick or device, either as alleged in said complaint or otherwise, has affiant ever attempted or is now attempting, to pass off his beer upon the public as or for the beer of complainant. On the contrary, affiant's label shows plainly that he is engaged in selling beer brewed by the Los Angeles Brewing Company, and that he is offering to the public no other beer than beer brewed by the said

Los Angeles Brewing Company, with his trademark of "Rhinegold" thereon.

And further affiant saith not.

FRED KOSTERING.

Subscribed and sworn to before me this 14th day of April, 1902.

[Seal] JOHN RALPH WILSON,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Received a copy of the within this 14th day of April, 1902.

M. S. EISNER,
Attorney for Complainant.

Filed April 14, 1902. Southard Hoffman, Clerk.

At a stated term, to wit, the March term, A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco on Monday, the 14th day of April, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

SEATTLE MALTING AND BREWING COMPANY (a Corporation), Complainant,

vs.

FRED KOSTERING, Defendant.

No. 13,219.

Order Granting Injunction Pendente Lite.

This cause came on this day to be heard upon complainant's application for injunction pendente lite—Milton S. Eisner, Esq., appearing as solicitor for complainant, and F. J. Castelhun, Esq., appearing as solicitor for defendant—and said matter having been heard upon the bill of complaint, order to show cause and restraining order, and affidavit of the defendant, and having been submitted to the Court, and the same being now fully considered, it is

Ordered that said application for injunction be and hereby is granted; that an injunction pendente lite, issue as prayed in the bill of complaint herein upon complainant's executing and filing a bond in the sum of five thousand dollars, and that defendant have ten days from this date within which to prepare and file a bill of exceptions herein,

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation), Complainant,

vs.

FRED KOSTERING, Defendant.

No. 13,219.

Undertaking on Injunction.

Know all men by these presents, that we, Seattle Brewing and Malting Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its principal place of business at the city of Seattle, State of Washington, as principal, and John Rapp and John G. Rapp, both of the city and county of San Francisco, State of California, as sureties, are held and firmly bound, jointly and severally by these presents, unto Fred Kostering, of the city and county of San Francisco, State of California, in the sum of five thousand dollars ($5,000.00), lawful money of the United States, for the payment of which said sum, well and truly to be made, we bind ourselves, our and each of our successors, heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated at San Francisco, California, this 15th day of April, 1902.

The condition of the above obligation is such that whereas, on the 14th day of April, 1902, after due proceedings had in that behalf, an order was duly and regularly given and made by the above-entitled Court in the above-entitled action, directing that an injunction issue out of and under the seal of said Court enjoining and restraining the above-named defendant, Fred Kostering, his attorneys, servants, agents and employees, and each of them, until the further order of said Court, from keeping, offering for sale or selling any beer not being the beer produced, manufactured, brewed or bottled by the complainant, put up in bottles of the general form, shape and color of the complainant's bottles, and bearing the label of the form, device and shape shown in Complainant's Exhibit "A," filed with the bill of complaint in said action, or in any other form, device or shape which shall be a colorable imitation of complainant's said label; and enjoining and restraining said defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by the said complainant under or bearing the label shown upon Complainant's Exhibit "B," filed with said bill of complaint.

And whereas, said Court, in and by said order, ordered and directed that said writ of injunction issue upon the filing of a good and sufficient undertaking, with two sureties to be approved by said Court, in the sum of five thousand dollars ($5,000.00), conditioned for the payment by said complainant to said defendant of any and all

loss and damage which the said defendant might sustain by reason of the issuance of said writ of injunction.

Now, therefore, if the said complainant, Seattle Brewing and Malting Company, a corporation, shall well and truly pay or cause to be paid to the said defendant, Fred Kostering, the amount of any and all loss and damage which the said defendant may sustain by reason of the issuance of said writ of injunction, then these presents are to be null and void; otherwise to remain in full force and effect.

Witness our hands and seals this 15th day of April, 1902.

SEATTLE BREWING AND MALTING COMPANY, a Corporation.

By E. F. SWEENEY,
Its Vice-President and General Manager.

JOHN RAPP. [Seal]
JOHN G. RAPP. [Seal]

United States of America,
Northern District of California,
City and County of San Francisco.

John Rapp and John G. Rapp, being severally duly sworn, each for himself says:

That he is one of the sureties in the above undertaking, and is worth the sum specified in said undertaking over and above all of his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident of the State of California and a householder therein.

JOHN RAPP.
JOHN G. RAPP.

Subscribed and sworn to before me this 15th day of April, 1902.

[Seal] JAMES M. ELLIS,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed] April 15, 1902. Approved.

SOUTHARD HOFFMAN.

Clerk.

The within bond is approved this 15th day of April, 1902.

WM. W. MORROW.

Judge.

Filed April 15, 1902. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation), Complainant,

vs.

FRED KOSTERING, Defendant.

No. 13,219.

Injunction.

The above-entitled court having on the 28th day of March, 1902, upon reading and filing the verified bill of complaint of the above-named complainant in the above

entitled action, given and made an order directing the defendant above named to be and appear before this court at the courtroom thereof, in the Appraisers' Building, in the city and county of San Francisco, State of California, on Monday, the 7th day of April, 1902, at the hour of 11 o'clock A. M., then and there to show cause, if any he had, why a writ of injunction should not be issued in the above-entitled action, enjoining and restraining the said defendant, his attorneys, servants, agents and employees, and each of them, until the further order of this Court, from keeping, offering for sale or selling any beer not being the beer produced, manufactured, brewed or bottled by the complainant, put up in bottles of the general form, shape and color of the complainant's bottles, and bearing the label of the form, device and shape shown in Complainant's Exhibit "A," filed with said bill of complaint, or in any other form, device or shape which shall be a colorable imitation of complainant's said label; and enjoining and restraining said defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by said complainant under, or bearing the label of, or designated by the words "Rhinegold Beer," or of the words or devices, or the manner of their arrangement, or the color of their printing, shown upon the label upon Complainant's Exhibit "B," filed with said bill of complaint, or any word or symbol calculated to deceive or mislead the public into the belief that said defendant's beer is the beer of said complainant; which said

order to show cause also provided that on the hearing thereof the said complainant might use, read and refer to the said verified bill of complaint, and to the said exhibits "A" and "B" filed therewith, and might use, read and refer to such other evidence, either oral or documentary, as might be produced on the hearing of said order, or which might be required by this Court on the hearing thereof, and which said order to show cause provided that a copy of said verified bill of complaint be served upon said defendant at least five days prior to the return day of said order to show cause.

And it appearing to the satisfaction of the Court that a true and correct copy of said verified bill of complaint and of said order to show cause was duly and regularly served upon the said defendant personally, at the city and county of San Francisco, State of California, at least five days prior to said return day.

And the said order to show cause having come on regularly for hearing before the above-entitled Court on Monday, the 7th day of April, 1902 at 11 o'clock A. M., and having been duly and regularly continued from said 7th day of April, 1902, to the 14th day of April, 1902, at 11 o'clock A. M.; and said order to show cause coming on regularly to be heard in open Court the 14th day of April, 1902, at 11 o'clock A. M. the said complainant appearing by its solicitor, Milton S. Eisner, Esq., and the said defendant appearing by his solicitor, F. J. Castelhun, Esq.; and the said complainant having on said hearing read and referred to the verified bill of complaint of said complainant filed herein, and to the said

Complainant's Exhibit "A" and Complainant's Exhibit "B," filed therewith, and the said defendant having on the said hearing read the affidavit of Fred Kostering in said action, sworn to April 14th, 1902, and, after argument by respective counsel, said order to show cause having been submitted to the Court for its consideration and decision, and the Court after having duly considered the same and being fully advised in the premises, having duly given and made its order directing that the injunction hereinafter set forth issue out of the above-entitled court upon the filing by said complainant of a good and sufficient undertaking, with two good and sufficient sureties to be approved by said Court, in the sum of five thousand dollars ($5,000.00), conditioned for the payment by said complainant to said defendant of any and all loss or damage which the said defendant may sustain by reason of the issuance of said injunction.

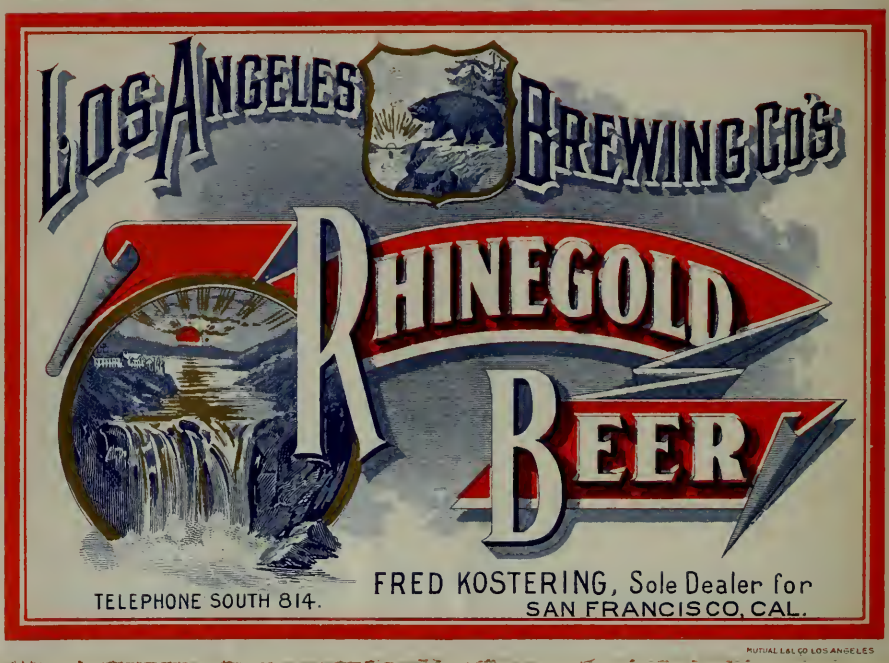
And the said complainant having, in accordance with said order, filed in said action a good and sufficient undertaking, with two sureties, in the said sum of five thousand dollars ($5,000.00), conditioned as above set forth, and said bond having been duly and regularly approved by said Judge of this court.

Now, therefore, it is ordered, adjudged and decreed that, until the further order of this Court, the said defendant, Fred Kostering, his attorneys, servants, agents and employees, and each of them, be and they hereby are enjoined and restrained from keeping, offering for sale or selling any beer (not being the beer produced, manufactured, brewed or bottled by the complainant), under

or bearing the label shown in Complainant's Exhibit "A," filed with said bill of complaint, which said Complainant's Exhibit "A," now on file in the above-entitled action, is hereby specially referred to, and a true and correct copy of which said label upon said Complainant's Exhibit "A" is hereinafter set forth, or any other label, which shall be a colorable imitation of complainant's said label; and also from keeping, offering for sale or selling any beer (not being the beer manufactured, produced, brewed or bottled by said complainant), under or bearing the label shown upon Complainant's Exhibit "B," now on file in said action, which said Complainant's Ehibit "B" is hereby specially referred to, and a true and correct copy of which said label upon said Complainant's Ehibit "B" is hereinafter set forth.

The following is a true and correct copy of the complainant's said label shown upon said Complainant's Exhibit "A," hereinabove referred to:

The following is a true and correct copy of the label shown upon Complainant's Exhibit "B," hereinabove referred to:



Witness, the Honorable WILLIAM W. MORROW, Judge of the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, with the seal of said Court affixed, this 15th day of April, 1902.

WM. W. MORROW,
Judge.

[Seal] Attest: SOUTHARD HOFFMAN,
Clerk.

[Endorsed]:

United States of America,
Northern District of California. } ss.

I hereby certify and return that I served the annexed injunction on the therein-named Fred Kostering, by handing to and leaving a certified copy thereof with Fred Kostering, personally, at San Francisco, in said District, on the 15th day of April, A. D. 1902.

JOHN H. SHINE,
United States Marshal.
By E. A. Morse,
Office Deputy.

Filed April 17, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.
No. 13,219.

Petition for an Order Allowing an Appeal to the United States Circuit Court of Appeals.

The defendant, Fred Kostering, being dissatisfied with the order allowing an interlocutory injunction duly made

and entererd herein on the 14th day of April, 1902, comes now by F. J. Castelhun, his solicitor, and petitions for an order allowing said defendant to prosecute an appeal from the said order allowing said interlocutory injunction to the Circuit Court of Appeals, Ninth Circuit, and also that an order be made fixing the amount of security which said defendant shall give upon said appeal.

April, 1902.

F. J. CASTELHUN,
Solicitor for Defendant.

[Endorsed]: Filed April 28th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE MALTING AND BREWING COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.
No. 13,219.

Assignment of Errors.

Now comes the above-named defendant, by F. J. Castelhun, his solicitor, and specifies the following as the particular errors upon which he will rely and which will be argued upon his appeal to the United States Circuit

Court of Appeals for the Ninth Circuit, from the order duly made and entered therein on the 14th day of April, 1902, granting the complainant an interlocutory injunction.

The United States Circuit Court for the Northern District of California, which made said order, erred therein as follows:

I.

In holding and deciding that defendant's label is an imitation of complainant's label.

II.

In holding and deciding that the use of defendant's label constituted unfair competition in trade on the part of said defendant.

III.

In holding and deciding that the defendant had so imitated complainant's label as to mislead and deceive the public and induce purchases of defendant's beer under the belief that it was complainant's beer.

IV.

In holding and deciding that defendant's label bore such a similarity to that of complainant that it was likely to impose on and deceive the public or ordinary purchasers.

V.

In granting complainant an interlocutory order enjoining and restraining said defendant from using his said label pendente lite.

VI.

In granting complainant an interlocutory order enjoining and restraining defendant pendente lite from keeping, offering for sale or selling any beer not brewed or bottled by the complainant under or bearing the label of or designated by the words "Rhinegold Beer," or of the words or devices or the manner of their arrangement or the color of their printing, shown upon defendant's label.

VII.

In failing to hold and decide that the said defendant's label was not an imitation of complainant's label.

VIII.

In failing to hold and decide that the use of defendant's label constituted fair competition in trade on the part of defendant.

IX.

In failing to hold and decide that the defendant had not imitated complainant's label and that defendant's label was not likely to mislead and deceive the public and induce purchases of defendant's beer under the belief that it was complainant's beer.

X.

In failing to hold and decide that defendant's label bore no such similarity to that of complainant that it was likely to impose on and deceive ordinary purchasers.

XI.

In failing to refuse complainant an interlocutory order restraining and forbidding defendant from using his said label pendente lite.

In order that the foregoing assignment of errors may be and appear of record, the said defendant presents the same to the Court.

F. J. CASTELHUN,
Solicitor for Defendant.

[Endorsed]: Filed April 28th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.
No. 13,219.

Order Allowing Appeal and Fixing Amount of Bond.

Upon motion of F. J. Castelhun, Esq., solicitor for the defendant, and upon filing a petition for an order allowing an appeal together with an assignment of errors:

It is ordered that an appeal from the order granting an interlocutory injunction entered and issued herein on the 14th day of April, 1902, be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit; that the amount of the bond for costs

upon said appeal to be given and filed by said defendant be and is hereby fixed at the sum of two hundred dollars, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 28, 1902.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed April 28th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.
No. 13,219.

Bond on Appeal.

Know all men by these presents, that we, Fred Kostering, as principal, and Charles Kostering and D. Muller, as sureties, are held and firmly bound unto the Seattle Brewing and Malting Company, a corporation, in the full and just sum of two hundred ($200) dollars to be paid

to the said corporation, its attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 30th day of April, 1902.

Whereas, lately at a session of the above-named court in the above-entitled action an order granting complainant an interlocutory injunction was entered and issued against the above-named principal.

And whereas, the said defendant obtained from the above-mentioned court an order allowing him to appeal from said order granting said interlocutory injunction.

And whereas, a citation directed to the said complainant, the Seattle Brewing and Malting Company, a corporation, is about to be issued citing and admonishing it to appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco in the State of California on the said appeal:

Now, the condition of the above obligation is such that if the said defendant, Fred Kostering, shall prosecute his appeal to effect and shall answer all damages and costs that shall be awarded against him if he fail to sustain his appeal, then the obligation be void; else to remain in full force and virtue.

FRED. KOSTERING.
CHAS. KOSTERING.
D. MULLER.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

Charles Kostering and D. Muller being first duly sworn, each, for himself, deposes and says:

That he is a householder in said district and is worth the sum of two hundred dollars, exclusive of property exempt from execution and over and above all his just debts and liabilities.

CHAS. KOSTERING.
D. MULLER.

Subscribed and sworn to before me this 30th day of April, 1902.

[Seal] JOHN RALPH WILSON,

Notary Public in and for the City and County of San Francisco, State of California.

This bond is approved this first day of May, 1902.

WM. W. MORROW,
Judge.

[Endorsed]: Filed May 1, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

SEATTLE BREWING AND MALTING CO. (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.
13,219.

Order Allowing Withdrawal of Original Exhibits.

It is hereby ordered, Complainant's Exhibits "A" and "B," being bottles with complainant's and defendant's labels thereon, be withdrawn for the purpose of being transmitted to the United States Circuit Court of Appeals, Ninth Circuit, and used on the appeal taken thereto.

May 1st, 1902.

WM. W. MORROW,
Judge.

[Endorsed]: Filed May 1, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

SEATTLE BREWING AND MALTING COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant.
No. 13,219.

Certificate to Record on Appeal.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 36, inclusive, to be a full, true and correct copy of the record and all proceedings in the above-entitled cause (excepting therefrom Complainant's Exhibits "A" and "B" which by order of Court are transmitted herewith and form a part hereof), and that the same together constitute the transcript of the record upon the appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of said Circuit Court awarding an injunction pendente lite herein.

I further certify that the cost of the foregoing transcript of record is $22.25, that the same was paid by the

defendant above-named, and that the original citation upon said appeal is annexed hereto.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 7th day of May, A. D. 1902.

[Seal] SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Ninth Circuit, Northern District of California.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Seattle Brewing Company and Malting Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 8th day of May, next, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 13,219, wherein Seattle Brewing and Malting Company, a corporation, is plaintiff and defendant in error, and Fred. Kostering is defendant, and plaintiff in error, and you are to show cause, if any there be, why the order rendered against the said plaintiff in error as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WM. W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this first day of May, 1902, A. D.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this first day of May, 1902.

M. S. EISNER,
Attorney for Defendant in Error.

[Endorsed]: No. 13,219. Circuit Court of the United States, Ninth Circuit, Northern District of California. Seattle Brewing and Malting Co., a Corporation, Complainant, vs. Fred. Kostering, Defendant. Citation. Filed May 1, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 834. In the United States Circuit Court of Appeals for the Ninth Circuit. Fred Kostering, Appellant, vs. Seattle Brewing and Malting Company (a Corporation), Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Northern District of California.

Filed May 7, 1902.

F. D. MONCKTON,
Clerk.

No. 834.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRED KOSTERING,
Appellant and Defendant,

vs.

SEATTLE BREWING & MALTING COMPANY (a corporation),
Appellee and Complainant.

Appellant's Opening Brief.

F. J. CASTERLIN,
Solicitor for Appellant.

FILED

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRED KOSTERING, Appellant and Defendant, vs. SEATTLE BREWING & MALTING COMPANY, a Corporation, Appellee and Complainant.	No. 834

APPELLANT'S OPENING BRIEF.

Statement of the Case.

The complainant, incorporated in the State of Washington, and engaged in the brewery business at Seattle, adopted the appellation of "Rainier Beer" for its product. Upon the bottles in which its beer is sold the complainant uses as a trademark a label, one of which is to be found on page 2 of the transcript.

The defendant is the sole bottler and vendor at San Francisco of the beer brewed by and at the brewery of the Los Angeles Brewing Company, a corporation of the State of California, with its principal place of business at Los Angeles. To distinguish this product, to which he has given the name of "Rhinegold Beer", from all other beers, the defendant adopted as his trade-

mark the label to be found on page 5 of the transcript.

Complainant's bill charges this label to be a colorable imitation of its own, and that its use by defendant was calculated to deceive and mislead the public into the belief that the beer sold by the defendant under his label is "Rainier Beer" and that such use by appellant of his label constitutes unfair and fraudulent competition against the complainant.

The bill then prays for a writ enjoining the defendant from selling any beer, other than complainant's UNDER OR BEARING THE LABEL OR DESIGNATED BY THE WORDS 'RHINEGOLD BEER'."

Upon the filing of the bill the Court issued an order requiring the defendant to show cause why the writ prayed for should not be granted.

In response to this order and in opposition to the application, the defendant appeared and filed the affidavit set out on pages 16 to 22 of the transcript, in which all dishonest intention was entirely repudiated.

Upon the hearing of the motion for the injunction, the Court granted an order restraining defendant *pendente lite* from selling any beer, other than complainant's, under the complainant's or defendant's label.

From this order the defendant appealed, specifying that the Court erred among other things in holding:

1. That defendant's label was an imitation of complainant's.

2. That the use of defendant's label constituted unfair competition.

3. That defendant had so imitated complainant's

label as to mislead and deceive the public and induce purchases of defendant's beer under the belief that it was complainant's.

4. That defendant's label bore such similarity to that of complainant's that it was likely to impose on and deceive the public or ordinary purchasers.

Other errors are specified, but as they are variations of the four above set forth, there is no need of calling special attention to them:

Argument.

Motto:

> "*I am not, as I consider, to decide cases in favor of fools and idiots, but in favor of ordinary English people, who understand English when they see it.*"
>
> Sir George Jessel in
>
> *Singer Mfg. Co.* vs. *Wilson*, L. R., 2nd. Ch., D. 434.

In trademark cases involving label infringements comparison is ordinarily the very first test employed to determine whether there is such a resemblance as will justify interference on the part of a court of equity.

If we apply this test to the case at bar, it will be seen that the charge made by the bill, that the main features of defendant's label are *colorably identical* with those of complainant's, is wholly unfounded.

The names of the two brewery companies, as written and spoken, have not the faintest resemblance to each other. On defendant's label the name of the *Los Angeles* corporation is printed in large type and as plainly as that of the *Seattle* corporation upon com-

plainant's. The names of the two products are likewise dissimilar to both eye and ear. The pictorial features on the one label cannot be mistaken for those on the other. On complainant's label we find a picture of majestic *Mount Rainier*; on defendant's, what a poetic imagination will recognize as the *Rhine-Falls of Schaffhausen*, upon whose waters "are reflected the golden rays of a vermilion-red sun disappearing behind the hills". The symbols or emblems upon both labels are also quite different. Upon complainant's, the device is a *white circle with red stars in the border*, the word "*Brewing*" extending across the same. Upon defendant's is a *shield with gilt border*, *the field representing a bear upon a rocky shore of the Golden Gate and the setting sun in the distance*. At the bottom of defendant's label is printed "*Fred Kostering*, *sole dealer for San Francisco*, *California*", while at the bottom of complainant's label we have "*John Rapp & Son*, *sole agents for California*".

No unprejudiced person can so far detect the least similarity in the two labels, and if asked to point out any with both before him, he could only say that in both there is a red border and also a red banner or streamer upon which there is printed "*Rainier Beer*" in the one case, and "*Rhinegold Beer*" in the other, the lettering, however, being wholly dissimilar, except that the capital "R"s and "B"s are the same in the names of both products.

The question to be decided is: DOES SLIGHT RESEMBLANCE IN UNESSENTIAL PARTICULARS OUTWEIGH GREAT DISSIMILARITY IN ESSENTIAL FEATURES?

An examination of the decisions and authorities will compel the Court to answer this question in the negative.

The cardinal rule upon the subject of unfair competition in trade is, that no one shall by imitation or any unfair device, induce the public to believe, that the goods he offers for sale are the goods of another and thereby appropriate to himself the value of the reputation which the other has acquired.

Coats vs. *Thread Co.*, 149 U. S. 562;
Sterling Remedy Co. vs. *Eureka Chemical and Mfg. Co.*, 70 Fed. 704, affirmed in *25 C. C. Ap.*, 314;
Proctor &c. Gamble Co. vs. *Globe Refining Co.*, 921 Fed. 357;
P. Lorillard Co. vs. *Peper*, 30 C. C. A. 496;
Pittsburg Crushed Steel Co. vs. *Diamond Steel Co. et al.*, 85 Fed. 637;
Kahn et al. vs. *Diamond Steel Co.*, 89 *idem* 706;
Liggett & Meyer Tobacco Co. vs. *Finzer*, 128 U. S. 182;
Enoch Morgans' Sons' Co. vs. *Troxell*, 89 N. Y. 292;
Foster vs. *Webster Piano Co.*, 13 N. Y. Supp. 338 (Supreme Court);
Desmond's Ap., 103 Pa. St. 126;
Gessler vs. *Grieb*, 80 Wis. 21;
Brown Chemical Co. vs. *Myer*, 31 Fed. 1453;
Hall vs. *Barrows*, 4 De G. J. S. 150;
Munn vs. *Kirk*, 40 Fed. 589;
McCartney vs. *Garnhart*, 45 Miss. 593;
Merchants' Banking Co. vs. *Merchants' Joint Stock Bank*, 9 Ch. D. 560;
Mfg. Co. vs. *Trainer*, 101 U. S. 51;
Blackwell vs. *Crabb*, 36 L. J. Ch. 504;

Blackwell vs. *Wright*, 73 N. C. 310;
Leather Cloth Co. vs. *Am. Cloth Co.*, 11 H. L. 523.

I shall not quote at large from all of these cases, but only promiscuously from a few of them.

In *Kann, et al.* vs. *Diamond Steel Co.*, *supra*, the Court said: "When all the words and symbols used by these litigants upon their respective packages, as they are actually offered for sale to the trade are considered, all possibility of their confusion or of the mistake of the one for the other, seems to disappear. *The name of the product, the name of its manufacturer and the place of its manufacture* are certainly three of the most distinctive characteristics by which an article of commerce may be distinguished from another."

In the case at bar the names of the manufacturers and of the product and of the place of manufacture are entirely different on both labels.

In *P. Lorillard Co.* vs. *Peper*, *supra*, Mr. Justice Brewer said: "Now whatever *minor points of resemblance* may be pointed out between these two labels, it seems to us the *differences are so pronounced* that there is no reasonable ground to apprehend that any man of ordinary intelligence would be misled. The two principal ways by which an article is distinguished in trade are: 1st, *the name of the manufacturer;* 2nd, *the descriptive name.* It is said, that the plaintiff had acquired a reputation which attached to all of its manufactures and that Lorillard's tobacco, particularly in the district where competition arose between plaintiff and defendant, was generally known, and known as a

superior article. Concede this, and it appears in the most marked way upon the defendant's label, *that it is not Lorillard's tobacco that he is selling.* The name '*Peper's*' *is in the largest letters and in the most conspicuous place.* No one who was looking for Lorillard's tobacco could for a moment be deceived into believing that this was that tobacco. *There is no similarity between the names. Neither the number of syllables nor the number of letters are the same and there is only one letter in the two names alike.*

"The other principal mode of identification is *the name under which the product passes*, and here the *difference between the two names* (though perhaps not so pronounced) *is still marked and obvious.* '*Tuberose*' and '*True Smoke*' when spoken do not sound alike, do not suggest the same idea; and while, considering the number of letters and the letters themselves, there is more of similarity than between the names of the manufacturers, yet the contrast between the two is apparent at a glance. *So that the two important features—those by which a purchaser identifies that which he wishes to purchase—the differences are so radical and obvious that it is difficult to perceive how any one could be misled.*"

If we paraphrase the latter part of the opinion to fit the facts in the case at bar, it would read as follows: "*The name* '*Los Angeles Brewing Company*' *is in the largest letters and the most conspicuous place. No one who was looking for Seattle Malting and Brewing Company's beer would for a moment be deceived into the belief that this was that beer. There is no similarity between the*

names. Neither the number of syllables nor the number of letters are the same, AND THERE IS NO LETTER IN THE TWO NAMES ALIKE.'

"*The other principal mode of identification is the name under which the article passes and* HERE THE DIFFERENCES BETWEEN THE TWO NAMES ARE STILL MORE MARKED AND OBVIOUS." (The Court will notice that owing to the pronounced difference between the two names of the products there is a deviation from the exact language of the opinion of Mr. Justice Brewer.) "'*Rainier*' *and* '*Rhinegold*' *when spoken do not sound alike, do not suggest the same idea;*" (Here, again, a deviation must take place, because the dissimilarity in the number of letters and the letters themselves is as great as between the names of the manufacturers and the products.) "*Yet the contrast between the two is apparent at a glance. So that in the* TWO IMPORTANT FEATURES—THOSE BY WHICH A PURCHASER IDENTIFIES THAT WHICH HE WISHES TO PURCHASE—THE DIFFERENCES ARE SO RADICAL AND OBVIOUS THAT IT IS DIFFICULT TO PERCEIVE HOW ANY ONE COULD BE MISLED."

In *Sterling Rem. Co.* vs. *Eureka Chem. & Mfg Co.*, *supra*, it was claimed that "No-To-Bac" was infringed by "Baco-Curo".

The Court, in holding that the terms were not *idem sonans* and did not infringe one on the other, said:

"*It is sufficient to say that both parties have the right to embark in this trade; each has the right to put forth every legitimate effort to increase its sales, even at the expense of its rivals*, SO LONG AS IT

REFRAINS FROM REPRESENTING ITSELF AS THE RIVAL CONCERN, OR FROM REPRESENTING ITS GOODS AS THE GOODS OF THE RIVAL CONCERN."

In *Hall* vs. *Barrows*, *supra*, the Court said:

"Imposition on the public is necessary for the plaintiff's title, but it must amount to an invasion by the defendant of the plaintiff's right of property. *For there is no injury if the mark used by the defendant is not such as is mistaken or likely to be mistaken by the plaintiff for the mark of plaintiff.*"

In *Merchant's Banking Co.* vs. *Merchant's Joint Stock Co.*, *supra*, it is held that when there is no intention upon the part of the defendants to appropriate, and no probability of their appropriating, plaintiff's business *and the similarity in the names used is not such as to necessarily lead to the inference of any intention to deceive, and that when there is no proof of actual deception by the use of the name adopted by the defendants*, ALTHOUGH IT SOMEWHAT RESEMBLES THAT OF PLAINTIFF, *relief will be refused.*

In *Blackwell* vs. *Crabb*, *supra*, it is held that the use of a particular label will not be restrained upon the ground of its general resemblance to the trademark of another manufacturer, when the defendant's label differs in those points which a purchaser would be most likely to examine, to ascertain whose article he was purchasing.

It was held in *Leather Cloth Co.* vs. *American Cloth Co.*, *supra*, that when the differences between the two devices are so palpable that a person of ordinary care

and diligence would not be deceived, equity will not enjoin.

To warrant the relief by injunction the devices adopted to the prejudice of the earlier business must be such as would ordinarily lead persons dealing in the article in question to suppose defendant's article to be that of plaintiff.

It must at least appear, it was held in *McCartney* vs. *Garnhart*, *supra*, that the resemblance is such as to raise the probability of a mistake on the part of the public or of a design and purpose on the part of the defendant to deceive the public.

In *Munn* vs. *Kirk*, *supra*, it was held that the use of a label on packages or bottles will not be enjoined when there is no attempt at deception thereby.

The principle on which equity interferes in infringement cases is that the use of a label resembling another amounts to false misrepresentation.

"When," says *High* (*2nd High on Injunctions*, 3d. Ed. Par. 1086) "there is no false representation or deceit, *the defendant only endeavoring by his advertisement and by selling the article complained of, to show to the public that the article is that of his own manufacture, equity will not interfere*, EVEN THOUGH THE DEFENDANT MAY ALSO USE AS DESIGNATING HIS ARTICLE THE NAME OF THE ORIGINAL MANUFACTURER OF THE ARTICLE SOLD BY THE PLAINTIFF."

In the case at bar it is perfectly obvious that the defendant by his advertisement is not practicing any deceit or representing his beer to be the beer of the

complainant. The label clearly informs the public that "Rhinegold Beer" is the manufacture of the Los Angeles Brewing Company and not "Rainier Beer" brewed by the Seattle Malting and Brewing Company.

The disposition is apparent that the appellant is desirous of conducting an open and fair competition.

When that is the case, there is no ground for complaint, *even though there be some similarity in the two trademarks.*

Pittsburg Crushed Steel Co. vs. *Diamond Steel Co. et al.*, *supra.*

The appellant therefore submits that the order of the Circuit Court must be reversed.

F. J. CASTELHUN,
Solicitor for Appellant.

No. 834.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

FRED KOSTERING,
Appellant and Defendant.

vs.

SEATTLE BREWING & MALTING COMPANY,
Appellee and Complainant.

APPELLEE'S BRIEF.

M. S. EISNER,
Solicitor for Appellee.

Pernau Print. 710 Clay St. S. F.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRED KOSTERING, Appellant and Defendant, vs. SEATTLE BREWING & MALTING COMPANY, Appellee and Complainant.	No.834

APPELLEE'S BRIEF.

The line of argument adopted by the counsel for appellant in his opening brief is doubtless familiar to the ears of this Court. It is the identical argument, invariably urged on behalf of defendants in infringement suits, ever since the law was first invoked to thwart "the endeavor of the dishonest mer- " chant to prey upon and profit by the reputation of his " honest competitor". In accordance with the time-honored custom, counsel for appellant has dwelt at considerable length upon the very marked (?) *differences* which he conceives to exist between the alleged infringing label and the label of the complainant. He has, however, very judiciously refrained from com-

menting upon their *resemblances.*

We are informed by the affidavit of the defendant, used upon the hearing in the Court below, that when he *commenced* bottling and selling the beer of the Los Angeles Brewing Company, *less than three weeks prior to the commencement of this action*, he selected the name "Rhinegold" as the name of the beer to be bottled and sold by him, and that he ordered a *label* which would *distinguish* his beer "from any and all " other beers wheresoever and by whomsoever brewed " and bottled" (trans. p. 17). Indeed the solicitude of this defendant to avoid trespassing upon the rights of the complainant is strikingly like that of the defendant in the famous "Uneeda Biscuit" case (95 Fed. Rep. 135), who asserted that, when he selected a name for his product, he took special care to select one which " should make the difference between his goods and the " complainant's distinct and plain, so that there could " be no possibility of a mistake". As the learned Justice Lacombe so well said in the opinion rendered by him in that case, "It is a curious fact that so many manufac- " turers when confronted with some well advertised trade " name or mark of a rival manufacturer, seem to find " their inventive faculties so singularly unresponsive " to their efforts to differentiate".

The complainant, Seattle Brewing and Malting Company, has for more than *eight years* last past been engaged in brewing a beer which it has designated as "Rainier" Beer. For more than *three years* last past it has been engaged in selling that beer at San Francisco, and elsewhere in the State of California, and

during all of that time, that portion of the beer which has been bottled by it, has been put up in certain dark glass bottles bearing the label of the peculiar design and color combination shown upon page 2 of the transcript. It is a matter of common knowledge in this community that the complainant's product has been very extensively advertised, and the uncontradicted averment of the bill of complaint is that complainant's beer has become widely known throughout the Pacific States and Territories and has acquired a high reputation as a useful beverage, and has commanded and still commands an extensive sale throughout the Pacific States and Territories, and especially in the State of California (trans. p. 3).

This was the situation on *March 9th, 1902, less than three weeks prior to the commencement of this action*, when the defendant, *for the first time* commenced the bottling and selling of beer in *San Francisco*. The defendant does not pretend that he was ignorant of the reputation of complainant's product, nor that he was unfamiliar with the label which complainant affixed thereto. If the fact were so, defendant would doubtless have made such claim in his affidavit, or he would at least have denied the averments of the bill in that behalf for lack of information and belief. We are entitled to presume, therefore, and also because he was engaged in the same general business, that he was familiar with the complainant's label, and that he knew of its value to the complainant, when he claims to have ordered a label, *on March 9th, 1902*, which would *distinguish* the beer bottled and sold by him from all other beers. The result of

defendant's effort to produce a distinguishing label is shown upon page 5 of the transcript. The infringing character of the latter label is perhaps better shown by a comparison of the *bottles* used by the respective parties, with the labels affixed, marked complainant's Exhibit "A" and "B", and made part of the record on this appeal.

A mere comparison of the two labels, thus affixed to the bottles, is, we submit, alone sufficient to show the infringing character of defendant's label. The bottles are of the *same shape* and *size* and are *identical in color*. The *labels* are exactly the same in *size*, and with the exception of the golden sheen from "the vermillion red sunset" of what counsel says "a poetic imagination will recognize as the Rhine "Falls of Schaffhausen", the color combination and the general design of the two labels are almost identical. Perhaps defendant's product was intended for consumption by persons of "poetic imagination", and this fact no doubt led to the substitution of the picture of the "Rhine Falls of Schaffhausen" on defendant's label for that of "majestic Mount Rainier" upon the label of complainant. The *scroll work*, which is such a prominent part of the labels, upon which the words "Rhinegold Beer" and "Rainier Beer" are printed, is *identical* in *color* and *design* in *both labels*. The *landscape views* in both labels are in exactly the same positions and enclosed in circles of exactly the same size. The *letters* used in both labels are of precisely the same size and design, and the general effect, upon the eye, of both labels,

especially when affixed to the bottles, is, upon cursory inspection, the same. It is only upon close *examination and comparison* that the differences, to which counsel directs the Court's attention, become apparent. That the *designer* of defendant's label had before him the complainant's label, is too apparent to require even assertion, much less argument. Such strict fidelity to the distinguishing characteristics of the complainant's label could not have been accidental. It cannot be conceived that two labels designed at *intervals so far apart* and by different persons, should accidentally bear so striking a resemblance to each other. As the learned Justice Lacombe, whose fame as a jurist in trade-mark cases is not confined to the circuit in which he presides, has so well said:—

> "Inspection of the labels must carry conviction to any unbiased and intelligent mind, that the later label was prepared by someone who had seen the earlier one, and that it was designed, not to differentiate the goods to which it was affixed, but to simulate a resemblance to complainant's goods sufficiently strong to mislead the consumer, *although containing variations sufficient to argue about should the designer be brought into Court. This is the usual artifice of the unfair trader. It does not deceive the first purchaser from the manufacturer, but it is sufficient to mislead the subsequent retail purchaser*, and thus, being sold at a less price than the genuine article, it eventually, if not enjoined, will interfere with the sales of the genuine article. *It is quite common in such cases to find assertions by defendant* that his goods are very superior to complainants; *that he has no intention to deceive anyone; that his labels are not at all an imitation; that in designing a form of package he has carefully endeavored to select a design which*

should distinguish his goods from all other goods in the world, including complainant's. When there is a marked similarity in the labels, but little weight is given, by a Court of equity, to such statements, and the mere circumstance that they are sworn to does not tend to increase respect for them, nor for the conscientiousness of the affiants who make them."

Collinsplatt vs. *Finlayson*, 88 Fed. 693.

The opinion of the same Judge in the still more recent case of *National Biscuit Co.* vs. *Baker*, 95 Fed. 135, discloses a state of facts strikingly similar to those of the case at bar:

"Defendants present the usual voluminous bundle of affidavits by persons in the trade to the effect that in their opinion no one is likely to mistake defendant's biscuit for complainant's. As has been often pointed out before, *it makes no difference that dealers in the article are not deceived. No one expects that they will be. It is the probable experience of the consumer that the Court considers.* Here, too, we have *the manufacturer of the articles complained of*, who explains, *as usual*, that in adopting a trade name by which to identify his own product, he has been *most 'careful not to trespass upon any rights of complainant*, and that after considerable thought' he selected a name which should make the difference between his goods and complainant's 'distinct and plain, so that there could be no possibility of a mistake'. *It is a curious fact that so many manufacturers of proprietary articles, when confronted with some well-advertised trade name or mark of a rival manufacturer, seem to find their inventive faculties so singularly unresponsive to their efforts to differentiate.* Thus in one case, with the word 'Cottolene' before him, *defendant's best effort at differentiation* resulted in 'Cottoleo', and 'Mongolia' seemed to another defendant entirely unlike 'Magnolia'. The manufacturer of the articles

which defendants in the case at bar are selling seems to have had no better luck, for with the word 'Uneeda' before him, his device to avoid confusion was the adoption of the word 'Iwanta'.

"The incessant use of the personal pronouns in daily speech has associated in every one's mind the sounds represented by the letters 'I' and 'U'; the two words are of precisely the same length; both end with the same letter, 'A'; and both express the same idea, namely, that the prospective purchaser's comfort would be promoted by the acquisition of a biscuit. *There are, as also is usual, a number of minor differences between the forms and dress of the two packages, which are expatiated upon in the affidavits and the brief;* but no one can look at both packages without perceiving that there are *strong resemblances, which could easily have been avoided had there been an honest effort to give defendant's goods a distinctive dress.*"

National Biscuit Co. vs. *Baker*, 95 Fed. 135–6.

And so in the case at bar, there are undoubtedly *differences* between the two labels, which are apparent upon comparison. Is not this always the case, and is it not always studiously so planned? Those differences however, do not, we submit, outweigh the *resemblances*, which are apparent even without examination. Why should the defendant have imitated, even in a slight degree, the distinguishing characteristics of the complainant's label? He was embarking in a new business, and he professes that he had a desire to give a distinctive name to his own product, and that he did not intend nor desire to trespass upon the rights of any other person. Surely there were other designs fully as attractive as that upon the complainant's label, perhaps even more attractive, of which the exercise of the slightest originality on the part of the designer would

have enabled the defendant to avail himself. He might even have used the picture of the "Rhine Falls of Schaffhausen" with its "vermilion-red sun "disappearing behind the hills", if he were so intent upon making his "Rhinegold" beer appeal to the taste of persons of "poetic imagination"; but he was not required to place that landscape in the same relative position upon his label as that occupied by the one on complainant's label. He might, in order to harmonize his label with the name of his product, have printed that name in letters of *gold*, or of "Rhinegold", instead of *white*, as is done in complainants label with the word "Rainier", and there was certainly no need of his adopting the same style of lettering as that used by complainant, nor of placing the words "Rhinegold Beer" in a scroll identical in form, color and design with the scroll on complainant's label. And since the respondent was, as his learned counsel tells us, so studiously anxious to differentiate his beer from that of the complainant, presumably because of the *superior* character and quality of his product, it might have occurred to him, if he had an honest intention to differentiate, that he might actually suffer a loss of his own trade by reason of the likelihood that some people, while desirous of securing his beer, might be led astray by the resemblance of his labels and bottles to those of the complainant, and might therefore purchase the beer of the complainant instead of his own.

The defendant's label itself shows a studied purpose on the part of the designer to imitate in all essential

particulars the chief characteristics of complainant's label, and the facts of this case, it is respectfully submitted, disclose as flagrant a case of unfair competition as has ever been brought to the attention of the Court.

In the case of *Fairbanks* vs. *Bell Mfg. Co.*, 77 Fed., 869, the simulation of complainant's label and package was *not nearly so flagrant* as in the case at bar. (See page 874.) The Court, *in reversing an order refusing to grant an injunction*, said:

> "Defendant is a manufacturer and sells only to the trade. By its salesmen it offers its soap powder in competition with complainants', as an article equal or superior thereto, and at a less price. *No effort was ever made to delude the trade into the belief that defendant's salesmen were selling complainant's goods. But equity regards the consumer as well as the middleman.* It is to him more than to the jobber or wholesale purchaser, that the various *indicia* of origin with which merchants dress up their goods appeal; and courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well known and popular style of package. * * * The circumstance that, out of something like a half score of changes, every one is in the same direction, *and not one in the multitudinous other directions which were open to choice*, is, to our minds at least, *conclusive evidence of design. Such things do not happen by chance.* In thus approaching the complainant's style of package, however, *the designer has been careful with each change to stop short of identity, except in the matter of color. In consequence it has been easier to point out specific differences than to show specific likenesses. And this circumstance had great weight with the Circuit Court, as is evident from the opinion.* * * *
>
> "There is no confusion possible in the *names* of the articles, *and the defendant has inscribed its own name*, 'Buffalo Soap Powder,' in bold letters, easy

to read. The judge who heard the cause in the Circuit was strong in the conviction that there was not a similarity calculated to mislead or deceive any buyer of ordinary prudence, that there was no danger of imposition upon any except idiots, and that people who have eyes, ears and common sense could not be beguiled by any similarity between the packages. *We are unable to reach the same conclusion*; when it is borne in miud that articles of this kind, when once they are generally known, become associated in the public mind *with the general appearance of the packages which contain them,—with the dress rather than the name—and that the ordinary retail purchaser of soap powder for consumption is not usually of a high degree of intelligence, and has never had the experience of an equity judge in analyzing the elements which make up the general appearance of a package, it is quite conceivable that a dishonest retail dealer, who kept complainant's and defendant's packages mingled together on the same shelves, some exhibiting the front panel and some the side panels to the public view, might easily palm off the one for the other upon an unsuspecting purchaser exercising the ordinary care which is to be expected of buyers of soap powder for consumption.*

N. K. Fairbanks Co. vs. *Bell Mfg. Co.*, 77 Fed. 877.

There is much more of argumeut upon the same lines in the case just cited, which it is impracticable to insert within the limits of a brief, and the special attention of the Court is directed to the opinion in that case.

The attention of the Court is also directed to the following cases, all of which are *in point*, and in noue of which is a more flagrant instance of fraudulant imitation disclosed than is shown in the case at bar:—

Hostetter vs. *Adams*, 10 Fed. 839;

Liggett & Myer Tobacco Co. vs. *Hynes*, 20 Fed. 883–6;

Glen Cove Manfg Co. vs. *Ludeling*, 22 Fed. 823;
Southern White Lead Co. vs. *Cary*, 25 Fed. 125;
Carbolic Soap Co. vs. *Thompson*, 25 Fed. 625;
Anheuser Busch Brewing Assn. vs. *Clarke*, 26 Fed. 410;
Pillsbury vs. *Pillsbury &c Co.*, 64 Fed. 841;
Penn. Salt Mfg. Co. vs. *Myers*, 79 Fed. 87;
Hiram Walker Sons vs. *Hockstaeder*, 85 Fed. 776;
Centaur Co. vs. *Killenberger*, 87 Fed. 725;
Collinsplatt vs. *Finlayson*, 88 Fed. 693;
Von Mumm vs. *Wittemann*, 85 Fed. 966;
Stuart vs. *F. G. Stuart Co.*, 91 Fed. 243;
National Biscuit Co. vs. *Baker*, 95 Fed. 135;
Bass vs. *Feigenspan*, 96 Fed. 211;
McLean vs. *Fleming*, 96 U. S. 253;
Rains vs. *White*, 52 S. W. 970;
Ft. Stanwix Canning Co. vs. *Wm. McKinley Canning Co.*, 63 N. Y. Supp. 704;
Lalance vs. *National Enamel &c Co.*, 109 Fed. 317;
Monopol Tobacco Works vs. *Gensior*, 66 N. Y. Supp. 155.

The language of Sir George Jessel in *Singer Mfg. Co.* vs. *Wilson*, L. R. 2nd. Ch. D. 434, which counsel has adopted as the motto of his argument, has not received the sanction of the courts of this country, whatever its value as an English precedent may be. The doctrine of that case is repudiated in all the leading cases in this country, notably in the case of *Fairbank Co.* vs. *Bell Mfg. Co.*, cited *supra*. Sir George asserted that he was not called upon to decide cases in favor of fools or idiots, but in favor of English people, who understood English when they see it. Apart, however, from the consideration that the ordinary retail purchaser has even a right to be careless in the purchase of well-

known brands of goods, the fact is that many people do not read English nor even understand English when they see it, and especially is this perhaps true of the beer drinking and beer buying public. The true doctrine is that announced in the case of *Pillsbury vs. Pillsbury Washburn Flour Mills Co.*, 64 Fed. 847, and repeatedly affirmed as follows:

> "The question, however, is of *resemblances, not differences. A test which applies only after the deviations have been pointed out favors the counterfeit.* * * * We must remember, in considering this and like cases, that *the purchaser of goods* with respect to brands by which the goods are designated, *is not bound to exercise a high degree of care.* A specific article of approved excellence comes to be known by certain catch words easily retained in memory, *or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstanstances. He is not bound to study or reflect; he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man, acting on the instant, would be deceived, that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, the imitation need only to be slight if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition.*"
>
> *Pillsbury* vs. *Pillsbury Washburn Flour Mills* 64 Fed. 847.

It is not necessary to take up the time of the Court

in commenting upon the cases cited by counsel for appellant. They are all cases in which the *dissimilarities* between the genuine and the alleged infringing tradema. were so marked, and there was such a *lack of resembla.* , that it was apparent upon casual observation that no infringement was attempted. In the case at bar, however, the simulation of complainant's label bears every evidence of fraudulent design, and is so flagrant in its character as imperatively to require the equitable interposition of the Court which granted the injunction. If the question were even a close one, and if the defendant had been permitted for any extended period to prosecute his business by using the objectionable label, without complaint or interruption on the part of the complainant, then there might have been some ground for refusing relief to the complainant. But this is not such a case. The application for the injunction was made just *nine days* after the defendant registered his label with the Secretary of State, and presumably before his goods could have obtained any substantial repute in the market in which they were intended to be sold. There was not the slightest reason for any simulation of complainant's label. The defendant had open to him other designs, multitudinous in number, any one of which he could have selected without laying himself open to the possibility of infringement, yet he deliberately selected a design which bears so close a resemblance to that of complainant's label that the differences are apparent only upon studied examination. In fact, the learned Judge of the lower Court, in granting the injunction, did so merely upon an inspection and comparison of

the two labels, and required no argument on behalf of complainant's counsel, merely contenting himself with the observation that defendant had apparently not made any strenuous effort to avoid imitating the complainant's label, and that if he did make such effort he had evidently not met with any marked degree of success. The defendant has certainly not shown himself to be entitled to the slightest favorable consideration from a court of equity, and the exceedingly prompt action of the complainant in attempting to defeat this unwarranted invasion of its rights is certainly a circumstance most strongly commending it to the consideration of the Court.

It is respectfully submitted that the order appealed from should be affirmed.

M. S. Eisner,
Solicitor for Appellee.

No. 837

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JESSE M. SMITH, EPHRAIM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HEBER A. SMITH, HANS S. NEILSON, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Appellants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Idaho.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

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In the Circuit Court of the United States in and for the District of Idaho.

IN EQUITY.

JESSE M. SMITH, EPHRIAM ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Idaho:

Jesse M. Smith, Ephriam P. Ellison, Elias Adams, and John W. Thornley, of Layton, Davis County, James W. Chipman, and James Love, of Kaysville, Davis County, Anthon J. Neilson, Benjamin R. Meek, Peter A. Neilson, Joseph S. Neilson, Hans S. Neilson, Heber A. Smith, Andrew Allen, Ellsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald and Isaac Fitzgerald, of Draper, Salt Lake County, Henry Chipman and Benjamin Dansie, of Salt Lake City, Thomas Mercer, of Ogden, William Aylett, Heber Aylett, John A. Egbert, of West Jordan, Salt Lake County, George Dansie, and Frank Dansie, of Riverton, Salt Lake County, William Crane, and I. J. Freeman, of Herriman, of said Salt Lake County, Joseph R. Olsen, of Brigham City, of Salt Lake City, L. Parker, of American Fork, and all citizens of the State of Utah, bring this, their bill against Thomas G. Lowe, of Franklin, John R. Thomas of Malad, David W. Jones, of Cherry Creek, D. H. Anderson, of Samaria, and John Doe and Richard Roe, whose other and true names are unknown, and whose names and residences are to your orators unknown, but who are acting for and in behalf of said defendants, but all of whom are citizens and residents of the State of Idaho, and citizens of the United States, and thereupon your orators complain and say:

First.—That said complainants are and at all times hereinafter mentioned were the owners, in the possession, and entitled to the possession of the number of sheep placed after their respective names, to wit, Jesse M. Smith, 2,000; Ephriam P. Ellison, 3,000; Elias Adams, 3,000; John W. Thornley, 2,000; James W. Chipman, 2,000; Henry Chipman, 2,000; James Love 1,500; An-

thon J. Neilson and Benjamin R. Meek, 2,000; Peter A. Neilson, Joseph S. Neilson, Hans S. Neilson, 4,000; Heber A. Smith, 4,000; Andrew Allen, 1,500; Ellsworth Allen, 1,500; Riley Allen, 1,000; Isaac Dunyon, 2,000; Aurelius Fitzgerald, 2,000; Isaac Fitzgerald, 2,000; Thomas Mercer, 8,000; William Aylett, 4,000; Heber Aylett, 2,000; John A. Egbert, 4,000; George Dansie, Frank Dansie and Benjamin Dansie, 5,000; William Crane, 4,000; I. J. Freeman, 2,000; Joseph R. Olsen, 5,000; L. Parker, 2,000.

That the amount in controversy in this action exceeds in value the sum of two thousand dollars, exclusive of interest and costs.

Third.—That the "public domain," as hereinafter used, refers only to and are intended to mean the wild, unclaimed lands of the Government of the United States situated in the States of Utah, Idaho and Wyoming, upon none of which has any filing been made or entry made in any land office of the United States, and which constitute a part of its public domain. That there are 72,500 head of said sheep of the complainants which are of the reasonable value of about five dollars each, or a total of about $350,000. That said sheep have been kept and grazed during the past winter on the desert in the States of Utah and Nevada, but chiefly in the county of Box Elder in the State of Utah, which county forms the north border line of the State of Idaho, where they are wholly dependent upon melting snow for water to drink. That said sheep are now on the border line of Utah and Idaho, where there is barely feed sufficient for their subsistence for a short time only. That if they are prevent-

ed by the defendants from passing therefrom through the State of Idaho, they will be forced to remain on said range and in the locality where they now are, where they will soon be wholly without food and water, and will die for the want of the same. That said plaintiffs have heretofore and for many years grazed their said and other sheep during the winter upon said desert in northwestern Utah, upon the said "public domain" of the United States; and during the balance of the year upon their own lands in the States of Idaho and Wyoming, and chiefly upon the wild, unclaimed, unoccupied lands or "public domain" of the United States, in the States of Idaho and Wyoming. That said plaintiffs are and for days last past have been endeavoring to drive said sheep upon and over the said "public domain" of the United States, into and through the States of Idaho and Wyoming, but have been prevented from so doing by the defendants, their agents, confederates and associates whose names are unknown to complainants except as stated above; but all of whom, as your orators are informed and believe, and therefore allege, are, or claim to be, citizens and residents of said State of Idaho.

That said desert is capable of, and does, and for many years has furnished grazing during the winter months only, for several hundred thousand sheep, all of which are solely dependent upon the snow for water to drink. That said desert lands are practically if not wholly unfit for any other use than that of grazing sheep. That said snow disappears about the middle of March of each year, the time varying slightly with the season, after which it is impossible to graze sheep on said desert for

want of water and verdure. And all of said sheep are then driven and grazed upon the said "public domain," in the mountains east and north of said desert. That sheep so grazed on said desert in northwestern Utah, and in particular the said sheep of complainants are grazed in the spring and summer upon said "public domain," in the States of Idaho and Wyoming. That the privileges of grazing sheep upon the said lands of the United States is of great value to said complainants, to wit, of the value of over $2,000 to each of your orators exclusive of costs and interest, and indispensable for their said sheep at the present time. That said desert lands extend to the southern border line of Idaho where the said sheep are now waiting for the privilege of traveling over the said "public domain" to their lambing grounds and spring and summer range in the State of Idaho and Wyoming, and where they are so prevented from being driven and transported by the defendants. That about one-third of said sheep are also on their way to what is known as the Eastern Markets; namely, Omaha, Nebraska, St. Joe and Kansas City, Missouri, and Chicago, Illinois, where the said plaintiffs desire to sell the same for mutton. That said mutton sheep are now poor and unfit for the market and cannot be sold for mutton except at a great loss. That it is necessary for said sheep to be grazed on the spring grass growing on said "public domain," in the States of Idaho and Wyoming, to become fat and valuable and marketable mutton sheep. That said public domain over which they will travel through the States of Idaho and Wyoming, if not prevented by the defendants, furnishes the said

grass with which to fatten said sheep at a minimum cost. That if said sheep are not permitted to be grazed on their said accustomed range an irreparable loss will be sustained by said plaintiffs.

Third.—That said defendants have heretofore and do now threaten to prevent all of said sheep from coming into the State of Idaho, and they have heretofore and will, if not restrained by this Court from so doing, prevent these plaintiffs from driving or transporting said sheep or any of them into or through the State of Idaho, and will prevent said sheep from grazing and pasturing or traveling over the said "public domain" of the United States into the said State of Idaho, for the sole purpose of enabling said defendants, their associates, their agents and confederates to monopolize and exclusively use said range, and graze their own sheep and cattle upon said lands of the United States.

That the said defendants, their associates and confederates, and the many persons acting in aid of them, are now threatening to, and unless restrained by the order or the process of this Court will, in violation of law and the rights of their complainants with force and arms and against the will and potent of complainants, drive and run complainant's sheep from the State of Idaho into the desert into the States of Utah and Nevada; which said acts will cause said complainants great and irreparable injury, and cause the loss of all their said ewe sheep and their lambs, and all, or nearly if not all, of said sheep by improperly driving and running said sheep and by forcing them into the said desert, where there is now no feed or water for the maintenance of said sheep.

And if said defendants are permitted to commit the said wrongs there will be a multiplicity of suits which can be avoided only by a court of equity in restraining the defendants in their said unlawful efforts and acts. That said defendants as your orators are informed and believe, and therefore allege, are financially irresponsible and will be wholly unable to repsond in damages, and therefore there is no adequate remedy at law against them or either of them.

Your orators further show that the said defendants claim the right to do the aforesaid acts under and by virtue of a certain proclamation of the governor and act of the legislature of Idaho, of which Exhibits "A" and "B" are true copies, and are made a part hereof. The said Exhibit "A" is proclamation of the governor, and the said Exhibit "B" is the act of the legislature aforesaid.

That the said defendant, Thomas G. Lowe, is State Sheep Inspector for the State of Idaho, and that the other defendants are his deputies and other inspectors acting under his direction. That as such, they insist that the said act and proclamation authorize them to drive the sheep of each of your orators out of the State of Idaho and away from the public domain of the United States within the said State of Idaho. And your orators claim and allege that the said proclamation and act of the legislature taken together with the facts herein alleged, are illegal and unconstitutional in this, to wit, that they are contrary to that clause of the constitution of the United States, section eight, article one, which authorizes Congress to regulate commerce between the

States; that they are contrary to that clause of the constitution of the United States, section two, article four, which provides that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States; that they are contrary to section one, article fourteen, of the constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law or deny to any person with its jurisdiction the equal protection of the law.

That under and in pursuance of that statute and proclamation the said defendants threaten to drive across the line into the State of Utah the sheep of your orators, as often as your orators shall attempt to drive them upon the public lands of the United States in the State of Idaho, and threaten to bring suit against your orators separately and as often as your orators shall attempt to drive said sheep across the line from the State of Utah into the State of Idaho.

That your orators desire to keep said sheep upon the lands of the United States only, upon which they have a right of way and the privilege of grazing.

That your orators further show that each and all the sheep of each and all of said orators are free from the disease known as scab or scabbies, and are in all respects healthy sheep and not infected with any disease whatsoever.

Fourth.—That the Government of the United States, acting under due authority, for a long time last past has,

and does now, employ inspectors of sheep passing into and from said and other States, to thoroughly inspect all said sheep and to determine whether or not the same are infected with disease and particularly the disease known as scab or scabbie; and your complainants allege that said Government inspector is now inspecting all said sheep for the said purpose of determining whether said sheep are so infected. And your complainants allege that they have caused said sheep to be so inspected and know that said sheep are free from said or any disease, and that said inspection by said Government inspectors now being made will further and also show that said sheep are free from any disease. That your orators further show to your Honors that said Government inspectors have just lately made an inspection of the range of places where said sheep have been kept and grazed for the past ——— months, and have determined and so advised your orators that the said places are not infected with any disease and particularly scab or scabbie. That said defendants in making said arrests, and while driving and threatening to drive said sheep back onto the said desert in Utah, are pretending and assuming to act under the said proclamation of the governor of the State of Idaho, a copy of which is hereto attached and marked Exhibit "A." That the recital therein that sheep in said alleged infected districts are diseased is wholly false and untrue; in fact, and the said alleged information upon which said proclamation is based if such has been given, is entirely false and groundless and given to said governor solely for the purpose of enabling said defendants and their said associates and confederates to

have and enjoy a monopoly of the grazing lands of the said "public domain" of the United States for themselves. That the said sheep of the plaintiffs herein are free from scab and all other diseases, and the sheep in the said prohibited districts of Utah and Nevada, are also free from disease of all kinds. That sheep are also transported from said alleged infected and prohibited districts only during the said prohibited seasons and through the said prohibited counties of Utah. That the said proclamation of the governor of the State of Idaho is an arbitrary and unwarranted exercise of power and the alleged facts upon which it is claimed to be justified and based are wholly false. That the said proclamation and the acts and threatened acts of said defendants, are an arbitrary assumption of power entirely unwarranted, unlawful and in violation of the constitutional rights of the plaintiffs.

Fifth.—That said sheep are mostly ewes heavy with lamb, and will commence to lamb about the 15th day of April, 1901. That said ewes to be successfully lambed must have proper care, lambing grounds and feed, which can only be obtained for them on the property of these plaintiffs in the State of Idaho, and upon the said "public domain" of the United States, in the State of Idaho. That it is impossible except at a great and unnecessary cost, for the plaintiffs to transport said sheep at the present season of the year into the State of Wyoming except through the State of Idaho. That said sheep can all be grazed and lambed upon said unoccupied "public domain" of the United States in the State of Idaho, and be transported over said lands from the locality where

they now are to the State of Wyoming, at a minimum expense. That if said defendants are permitted to drive said sheep of the plaintiffs back from the State of Idaho, as they threaten to and will do if not so as aforesaid restrained, said ewe sheep will be made to prematurely lamb and die, and all said sheep and their lambs will be destroyed and lost for the want of food and water, and proper care and attention, and these complainants will be thereby irreparably damaged in the sum of about $350,000, or five dollars per head for each of their said sheep.

Sixth.—That said defendants threaten to, and will if not prohibited by this Court, confiscate and appropriate to their own use by force, the said sheep of the plaintiffs. That said defendants allege that they will use an army of the citizens of the State of Idaho to force and drive said sheep out of the State into the State of Utah; and that they will with force take their own use so many of said sheep so entering the State of Idaho as will fully compensate themselves and those so aiding them for their time and service without trial or any process of law whatever, if any of said sheep remain alive after having been so driven back as aforesaid and abused by the defendants.

Seventh.—That the said "public domain" of the United States in the State of Idaho is a natural and most desirable range for sheep, and over which the sheep from the said desert in Utah, and Nevada can be driven and transported to the eastern markets and summer range. That said unoccupied public lands of the United States in the mountains of Idaho, Northern Utah and Wyoming,

are a natural summer range for sheep, providing them with abundant grass and herbs for food, fresh, healthful water to drink, and fresh, cool air in the heat of summer; said mountain range is also essential for the fattening of said sheep for the market, and without it about one-third of the sheep which are as aforesaid intended for the eastern markets would be unsalable. That said defendants threaten to and will, if not restrained by this Court, wholly prevent the complainants from entering upon said range with their said sheep.

To the end that your orators may obtain the relief to which they are justly entitled in the premises they now pray your Honors to grant them due process by subpoena directed to said Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, defendants, hereinbefore named, requiring and commanding them and all persons acting under their direction or in aid of them, and each of them, to appear herein and answer but not under oath the same being expressly waived, the several allegations in this your orator's bill contained.

And your orators further pray that your Honors decree that the complainants, and each and all of them, have the right to drive their sheep upon the public domain of the United States, in and within the State of Idaho, and that the defendants, and each and all of them, be restrained from interfering or meddling with the sheep of your orators, and from intermeddling with any of them or driving them from the range of the United States.

And your orators further pray that your Honors grant unto your orators your writ of injunction commanding said defendants and all persons claiming to act under their authority, direction or control or in aid of them or any of them, to absolutely desist and refrain from in any way preventing the said complainants from driving and grazing their said sheep over and upon the unclaimed and unoccupied Government lands of the United States in the State of Idaho, or from in any way interfering with their herders while so engaged in driving and grazing said sheep on said public domain of the United States, until such time as your Honors shall appoint and direct and order herein; and that upon such hearing the writ herein prayed for be made and confirmed until the final determination of this suit and that thereupon the said injunction be made perpetual. And further pray for such other and further relief as may be just and equitable.

May it please your Honors, the premises being considered, to grant unto your orators a writ of injunction, issuing out of and under the seal of this Honorable Court, enjoining and restraining the said Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, their agents, solicitors, employees, confederates, and associates from in any manner driving disturbing or interfering with the sheep of your orators, and each of them, and from in any manner preventing any of the said sheep from grazing upon the public lands of the United States within the State of Idaho.

May it please your Honors to grant unto your orators, not only the writ of injunction conformable to the bill, but also a writ of subpoena, directed to the said Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, commanding them on a day certain, therein to be named, to be and appear in this Honorable Court, then and there to answer to the premises, and to stand to and abide and perform such further order and direction and decree as may be made against them and each of them.

And your orators will ever pray, etc.

JAMES H. MOYLE,
L. R. ROGERS,
ARTHUR BROWN,
Solicitors for Complainant and of Counsel.

United States of America,
District of Utah,
City and County of Salt Lake. } ss.

Jesse M. Smith, being duly sworn, deposes and says that he is one of the complainants in the within entitled action; that he has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters, that he believes it to be true.

JESSE M. SMITH.

Subscribed and sworn to before me this 18th day of March, A. D. 1901.

[Seal]

ADAM A. DUNCAN,
Notary Public.

Exhibit "A."

QUARANTINE PROCLAMATION.

Governor Hunt Schedules Certain Localities on Account of Scabs.

State of Idaho, Executive Office.

Whereas, under the provisions of the act of the legislature of the State of Idaho, entitled "An act establishing quarantine against diseased sheep, prescribing the duties of the governor and State sheep inspector in relation thereto, and providing penalties for the infraction of its provisions," it is made my duty, whenever I shall have good reason to believe that scab, or any other infectious disease of sheep has become epidemic in certain localities in any other State or territory, or that conditions exist that render sheep likely to convey disease, that I shall thereupon, by proclamation, designate such localities, and prohibit the importation of sheep from such localities, except under such restrictions as I, after consultation with the State sheep inspector, may deem proper; and,

Whereas, I have received statements from reliable wool growers and stock raisers of the State of Idaho, and have also received an official report from the State sheep inspector, based upon personal examination, as well as affidavits of responsible citizens of this State, to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities and districts, to wit, in the counties of Rich, Cache and Box Elder in the State of Utah, in the county of Uintah in the State of Wyoming, and the county of Elko in the State of Nevada; and,

Whereas, from such statements, reports and affidavits, I have reason to believe that the disease known as scab or scabbies has become epidemic among sheep in said above-stated localities or districts; and,

Whereas, it is known that sheep from said districts are being moved, driven and imported into the State of Idaho, and that such sheep from said districts, if moved, driven or brought into this state, will thereby spread infection and disease on the ranges and among the sheep of this State, which act would result in great disaster:

Now, therefore, I, Frank W. Hunt, Governor of the State of Idaho, by virtue of authority in me vested, and after due consultation with the State sheep inspector, do hereby prohibit the importation, driving or moving into the State of Idaho, of all or any sheep now being held, herded or ranged within said infected districts, or that may be driven through said district, viz., the counties of Rich, Cache and Box Elder in the State of Utah, the county of Uintah in the State of Wyoming, and the county of Elko in the State of Nevada, or which may hereafter be held, herded or ranged within, or driven through, said infected districts, for a period of 40 days from and after the date of this proclamation. After the termination of said 40 days, sheep from said infected districts may be moved into this State only upon compliance with the terms of the act of the legislature of the State of Idaho, entitled "An act to suppress contagious and infectious diseases of sheep, to create the office of sheep inspector, etc." Approved March 6th, 1901.

That any sheep imported into this State from the said infected districts, over any railway, and which are unloaded at any point in this State for the purpose of feeding or grazing upon the ranges within this State, shall be held and quarantined within two miles of the point where unloaded for a period of 15 days. And at the expiration of said 15 days, said sheep shall be inspected by the State sheep inspector, or his deputies, and if found free from disease may be allowed to graze upon the ranges, or if said inspection shall show that said sheep are diseased, before they shall be allowed to travel over or graze upon the ranges, they shall be held and dipped, as provided in the act of the legislature of the State of Idaho, entitled "An act to suppress contagious and infectious diseases of sheep, etc." Approved March 6th, 1901, until said sheep are cured of all disease.

That the quarantine proclamation heretofore issued by me, on the 11th day of February, 1901, is hereby revoked.

In witness whereof, I have hereunto set my hand and caused to be affixed the great seal of the State.

Done at Boise, the capital, this 9th day of March, in the year of our Lord one thousand nine hundred and one.

By the Governor:

FRANK W. HUNT.

CHARLES J. BASSETT,
Sec. of St.

Exhibit "B."

Legislature of the State of Idaho. Sixth Session.

S. B. No. 63.

(As Amended.)

In the Senate.

By Jones—By request.

An Act Establishing Quarantine Against Diseased Sheep, Prescribing the Duties of the Governor and State Sheep Inspector in Relation Thereto, and Providing Penalties for the Infraction of Its Provisions.

Be it Enacted by the Legislature of the State of Idaho:

Section 1. Whenever the Governor of the State of Idaho has reasons to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other State or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation, designate such localities and prohibit the importation from them of any sheep into the State, except under such restrictions as, after consultation with the State sheep inspector, he may deem proper.

Any person or corporation, who, after publication of such proclamation, receives in charge any such sheep from any of the prohibited districts and transports, conveys or drives the same to and within the limits of any of the counties of this State, is punishable by a fine not exceeding one thousand ($1,000) dollars, nor less than two hundred ($200) dollars, and is liable for all damages that may be sustained by any person by reason of the importation of such prohibited sheep.

Section 2. Whenever the proclamation of the governor, issued as hereinbefore provided shall prohibit the

driving or importation of sheep into this State from another State or territory, or subdivisions thereof, it shall be the duty of the State sheep inspector, or any of deputies, to drive or transport said sheep so coming into this State in violation of said proclamation back across the State line from which they came, using all necessary force in so doing; provided, that the State sheep inspector or his deputies may employ such assistance as may be necessary for the enforcement of the provisions of this act; and the costs of such deportation shall be a lien upon said sheep; provided, that if the fine and costs in this act provided shall not be immediately paid the deputy sheep inspector shall retain a sufficient number of said sheep to pay such fine and costs, which sheep shall be sold to pay the same, by the deputy sheep inspector, in the same manner as provided by law for the sale of personal property to satisfy a judgment, and for such services the deputy sheep inspector shall receive and retain such fees as is allowed sheriffs for like services to be taxed as costs.

Section 3. Any person failing or refusing to assist such deputy sheep inspector, as in the preceding section provided, shall be punished as in section 6517 of the Revised Statutes of Idaho (1887) made and provided.

Section 4. Whereas an emergency exists therefor, this act shall be in force and effect from and after its passage and approval.

[Endorsed]: No. 68. United States Circuit Court, District of Idaho. Jesse M. Smith et al., vs. Thomas G. Lowe, et al. Complaint. Filed March 21, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRIAM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NIELSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNTON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Praecipe for Appearance of Defendants.

To the Clerk of the Above-entitled Court.

You will please enter our appearance as solicitors for all the defendants in the above-entitled cause, excepting John Doe and Richard Roe.

Dated March 21, 1901. FRANK MARTIN.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al. vs. Thomas G. Lowe et al. Appearance of Defendants. Filed March 21, 1901. A. L. Richardson, Clerk,

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In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRIAM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NIELSON, BENJAMIN R. MEEK, PETER A. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ISAAC DUNTON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Demurrer.

The demurrer of Thomas G. Lowe, John R. Thomas, David W. Jones and D. H. Anderson, the above-named

defendants, to the bill of complaint of the above-named complainants.

I.

These defendants, by protestation, not confessing or acknowledging all, or any, of the matters or things, in the said bill of complaint contained, to be true, in such manner and form as the same are herein set forth and alleged, jointly demur to the said bill, and for causes of demurrer show:

II.

That it appears from said bill of complaint of complainants that this Court has no jurisdiction to hear and determine this action.

III.

That it does not appear that the decision of the cause will necessarily turn upon the construction of the constitution of the United States or any law or statute of the United States.

IV.

That the said complainants have not in or or by said bill made or stated such a cause as does or ought to entitle them to the relief thereby sought or prayed for, from or against these defendants or either of them.

V.

That said bill of complaint of complainants is wholly without equity.

Wherefore and for divers other good causes of demurrer appearing on the said bill, these defendants demur thereto, and they pray the judgment of this Honorable Court whether they shall be compelled to make

further, or any answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

FRANK MARTIN,
Solicitor and Counsel for Defendants.

State of Idaho, } ss.
County of Ada. }

Thomas G. Lowe, one of the above-named defendants, makes oath and says, that he is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay.

THOMAS G. LOWE.

Subscribed and sworn to before me this 28th day of March, 1901.

[Seal] HUGH E. McELROY,
Notary Public.

I hereby certify that, in my opinion, the foregoing demurrer is well-founded in point of law.

FRANK MARTIN,
Of Counsel for Defendants.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al., vs. Thos. G. Lowe et al. Demurrer. Filed March 28th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, for the District of Idaho.

JESSE M. SMITH et al.,
Complainants,
vs.
THOMAS G. LOWE et al.,
Defendants.

Opinion.

In this action complainants show by their complaint that their sheep have been wintered in the States of Nevada and Utah; that they are now upon the border of Idaho en route to places within said State where they have before summered; that they are practically without food or water; that defendants are preventing their admission into the State, and that there is great danger of their injury and loss, and that defendants justify their acts by reason of a law of the State and the governor's proclamation in pursuance thereof. Complainants claim that the State law is in violation of the provisions of the constitution of the United States. To the complaint defendants have demurred.

The State law provides that whenever the governor shall have reason to believe any infectious disease of sheep has become epidemic in localities outside of the State of Idaho, he must, by his proclamation, designate such localities and prohibit sheep therein from entering the State, "except under such restriction, as after

consultation with the State sheep inspector, he may deem proper." In pursuance of this law the governor of this State, on the 9th day of March, 1901, issued his proclamation prohibiting, for the period of forty days, any sheep from the districts therein named as infected, from entering the State. The complainants' sheep were among those affected by this proclamation.

That the citizens of any State in this Government have the right to drive their sheep into this State will not be questioned. That right is as well defined and stable as the existence of the Government itself, for both rest upon the constitution. It is also well settled that States in the exercise of their police power and for the protection of their citizens, may enact and enforce laws to exclude from their borders diseased sheep or other diseased animals. Also, it is true, that when those laws are made as quarantine regulations, but for the real purpose of excluding the property of citizens of other States regardless of their health condition, they are as much unconstitutional as if openly and directly prohibiting the admission of livestock regardless of condition.

The important question here is, who shall determine when the State law and its enforcement, are made in good faith for the exclusion of diseased animals. Shall that be left to the State authorities alone, or may this Court investigate and determine the facts? If left exclusively to the State authorities, if they are disposed to be partial, the law might be so enforced as to make the admission of sheep into the State a matter of so much hardship, as to amount to their practical exclusion. In this case the proclamation prohibited "the importation,

driving or moving into the State of Idaho" of the sheep in question for the period of forty days, from the 9th day of March, 1901, the date of the proclamation. These sheep were then upon the border of the State, and as alleged, nearly without food; to hold them for that length of time would at least be a very great hardship, if it would not have operated to compel the complainants to drive their flocks to some other less hostile locality.

Upon the application for a temporary restraining order against defendants, an investigation was had by affidavit and by the oral evidence of witnesses had in court, which indicated that the sheep were not diseased, and it was also shown by the chief witnesses, upon both sides, that sheep having the disease of scab, which it was claimed existed in this case, could be so far cured as to render their passage through the country safe from the spread of the disease, by two dippings ten days apart. To avoid the admission of any diseased sheep, the Court sent the chief State sheep inspector and the United States Government inspector, Messrs. Lowe and McBirney, to personally inspect the sheep, and if found free from disease to admit them without further delay. The result of their inspection was that the sheep were found practically free from disease, and they were admitted. The simple facts in this case are, that the sheep were not so diseased as to justify their exclusion. To have excluded them, or to have even incumbered their admission by unnecesary regulations, would not only be a mistake, but also the denial of the sacred right which every citi-

zen of this Government has, of transporting his property wherever he will regardless of State lines.

Since the commencement of this action and the hearing had therein, two decisions have been announced by the Supreme Court of the United States, which, as they are understood, this Court will follow. (Rasmussen vs. Idaho, 181 U. S. 198, and Smith vs. St. Louis & Southwestern Railroad Co., Id. 248.) The latter involved certain livestock quarantine regulations of the State of Texas. The governor's proclamation prohibited the transportation from the State of Louisiana into Texas of certain livestock between June 5th and the following November 15th. The Court, while sustaining the law and the proclamation of the governor in enforcing it, says that "To what extent the police power of a State may be exerted on traffic and intercourse with the State, without conflicting with the commerce clause of the constitution of the United States has not been precisely defined." It reviews its past decisions upon the subject, including the well-known case of Railroad Co. vs. Husen, 95 U. S. 465, from which the conclusion is reached that any law which excludes all of a class of property, regardless of its condition, is unconstitutional; that police regulations to exclude diseased stock or unhealthy food are valid, and that any laws or regulations "burdened with such conditions as would wholly prevent the introduction of sound articles from other States" are void. Also, "It depends upon whether the police power of a State has been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude, with-

out discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine.* The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed not only to the actually diseased, but to what has been exposed to disease. * * * * Under the guise of either (a proper quarantine or inspection law), a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. * * * * It is the character of the circumstances which gives or takes from a law, or regulation of quarantine a legal quality." These last clauses would indicate that the action of the State officers and the circumstances surrounding a given case may be inquired into, and there is nothing to indicate that a United States Court has not such authority. Force is added to this by the further statement of the Court that "We are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of." In this Texas case all the cattle from a certain district in Louisiana, said to be affected with disease, were excluded from Texas for a period of one hundred and sixty-three days. In this case the law is no more stringent than the Texas statute, and the exclusion is for but forty days. The difference in the cases being, that in the Texas case the cattle were shipped from Louisiana long after the governor's proclamation, while in this case the sheep were en route for their pas-

ture lands, and upon the borders of this State, practically without food, when the proclamation was issued.

In the Rasmussen case ante, under a similar quarantine sheep law, the governor on April 12th, 1899, issued his proclamation prohibiting Utah and Nevada sheep from entering within this State, for the period of sixty days thereafter. The Court says of the law that it "is not a continuous act, operating year after year irrespective of any examination as to the actual facts, but is one contemplating in every case investigation by the chief executive of the State, before any order of restraint is issued. Whether such restraint shall be total or limited, and for what length of time, are matters to be considered by him upon full consideration of the condition of the sheep in the localities supposed to be affected. The statute was an act of the State of Idaho, contemplating solely the protection of its own sheep from the introduction among them of any infectious disease, and providing for only such restraints upon the introduction of sheep from other States, as in the judgment of the State was absolutely necessary to prevent the spread of disease." These decisions do not say that a Federal Court may not, in such cases, entertain jurisdiction for the purpose of determining the good faith both of the law and its enforcement, and while in the one case it is said that such a law cannot be made a mask to shield a violation of the interstate commerce constitutional provision, in both there is an intimation that when the law upon its face is one to prevent the spread of disease in the State, the State officers may be relied upon to, in

good faith, enforce it in justice to all. At any rate, in the two cases above examined, the laws and their enforcement by the State officers were sustained, and such laws and such enforcement thereof were as strong in exclusion of foreign stock as is the law in the case under consideration. It must follow therefore, that this law may be enforced by the State officers; that the complaint does not state a cause of action of which this Court may take jurisdiction, and the demurrer thereto is sustained.

Dated at Boise, Idaho, October 24, 1901.

BEATTY,

Judge.

[Endorsed]: No. 68. United States Circuit Court, District of Idaho. Jesse M. Smith et al. vs. Thomas G. Lowe et al. Opinion. Filed October 24, 1901. A. L. Richardson, Clerk,

In the Circuit Court of the United States, for the Southern Division of the District of Idaho.

JESSE M. SMITH et al.
vs.
THOMAS G. LOWE et al.

Order Sustaining Demurrer.

On this day was announced the decision of the Court upon the demurrer to the complaint herein, heretofore argued and submitted. Ordered that said demurrer be, and the same is hereby, sustained.

In the absence of counsel for plaintiff, an exception is hereby allowed to the above ruling.

Dated Boise, Idaho, October 24, 1901.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al. vs. Thomas G. Lowe et al. Order Sustaining Demurrer. Filed October 24, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, for the Southern District of Idaho.

JESSE M. SMITH, EPHRIAM ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOWE, ANTHONY J. NIELSON, BENJAMIN R. MEEK, PETER A. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ISAAC DUNTON, AURELIOUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLESON, L. PARKER,

Plaintiffs,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other and True Names are Unknown,

Decree.

This cause came on to be heard in regular term of this court on the 7th day of October, 1901, upon the bill of complaint of complainants and the demurrer of the de-

fendants thereto, and was argued by counsel and thereupon upon consideration by the Court, this Court, by decision given in writing on the 24th day of October, 1901, held that the bill of complaint of complainants did not state a cause of action of which this Court might take jurisdiction and the demurrer of defendants thereto was sustained, and it was ordered by this Court that this cause be dismissed.

Therefore, it is ordered, adjudged, and decreed that complainant's bill do stand dismissed out of this court, and that defendants have and receive of complainants herein their costs in this cause paid for the services of the officials of this court, amounting to the sum of $31.40.

Dated at Boise, Idaho, this 24th day of October, 1901.

JAS. H. BEATTY,

Judge.

[Endorsed]: No. 68. United States Circuit Court, District of Southern Idaho. Jesse M. Smith et al., Plaintiffs, vs. Thomas G. Lowe et al., Defendants. Decree. Filed October 24th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRIAM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Petition for Appeal and Order Allowing Same.

The above-named plaintiffs, conceiving themselves aggrieved by the order and decree entered herein on Octo-

ber 24th, 1901, in the above-entitled proceedings, sustaining the defendants' demurrer and dismissing the plaintiffs' bill in equity filed herein, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the said Ninth Circuit.

JAMES H. MOYLE,
LINDSEY R. ROGERS,
ARTHUR BROWN,
Attorneys for Plaintiffs and Appellants, Salt Lake City, Utah.

Boise City, State of Idaho, April 8, 1902.

And now, to wit, on April 8, 1902, it is ordered that the appeal be allowed as prayed for.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al. vs. Thomas G. Lowe et al. Petition for Appeal. Filed April 8th, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRIAM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Assignment of Errors.

And now, on the 8th day of April, 1902, comes the said plaintiffs, by their attorneys, James H. Moyle, Brown &

Henderson and L. R. Rogers, and say, that the order and decree in said cause sustaining the demurrer of the defendants to the plaintiffs' bill in equity filed herein, and dismissing said bill, is manifestly erroneous and against the just rights of the said plaintiffs in this, to wit:

1. That the Court erred in sustaining the said demurrer interposed to the plaintiffs' said bill in equity.

2. That the Court erred in dismissing the plaintiffs' said bill and refusing to grant the plaintiffs the relief prayed for in said bill.

Wherefore, said plaintiffs and appellants pray that said order and decree be reversed, and that appellants be restored to all things which they have lost by reason of said order and decree.

JAMES H. MOYLE,
LINDSEY B. ROGERS,
ARTHUR BROWN,
Attorneys for Plaintiffs in Error.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al., vs. Thomas G. Lowe et al. Assignment of Errors. Filed April 8th, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRIAM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Bond on Appeal.

Know all men by these presents, that we, Fidelity and Deposit Company of Maryland, are held and firmly

bound unto the above-named defendants, Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, whose other or true names are unknown, in the sum of five hundred dollars, to be paid to the said defendants, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 28th day of March, in the year of our Lord, one thousand nine hundred and two.

Whereas, the above-named plaintiffs, Jesse M. Smith, Ephriam P. Ellison, Elias Adams, John W. Thornley, James W. Chipman, James Love, Anthon J. Neilson, Benjamin R. Meek, Peter A. Neilson, Joseph S. Neilson, Hans S. Neilson, Heber A. Smith, Andrew Allen, Ellsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald, Isaac Fitzgerald, Henry Chipman, Benjamin Dansie, Thomas Mercer, William Aylett, Heber Aylett, John A. Egbert, George Dansie, Frank Dansie, William Crane, I. J. Freeman, Joseph R. Olsen, L. Parker, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order and decree rendered in the above-entitled suit, by the Judge of the United States Circuit Court for the District of Idaho:

Now, therefore, the condition of this obligation is such, that if the above-named Jesse M. Smith, Ephriam P. Ellison, Elias Adams, John W. Thornley, James W. Chipman, James Love, Anthon J. Neilson, Benjamin R.

Meek, Peter A. Neilson, Joseph S. Neilson, Hans S. Neilson, Heber A. Smith, Andrew Allen, Ellsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald, Isaac Fitzgerald, Henry Chipman, John A. Egbert, George Dansie, Frank Dansie, William Crane, I. J. Freeman, Joseph R. Olsen, L. Parker shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof, we have hereunto set our hands, this 28th day of March, A. D. 1902.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Seal] By CHAS. A. CLARK,

Its Attorney in Fact and Member of Local Board.

Attested and sealed:

By SHERMAN G. KING,

General Agent for State of Idaho, Residing at Boise City.

Signed, sealed and delivered, this 28th day of March, A. D. 1902.

Approved by:

JAS. H. BEATTY,

Judge.

State of Utah, }
County of Salt Lake. } ss.

_____ and _____

sureties on the foregoing bond, being duly sworn, each for himself, deposes and says that he is worth, after pay-

ing his just debts, the sum of $500.00, exclusive of the property exempt from execution by the laws of the State in which he resides.

Subscribed and sworn to before me by the above-named sureties, this ——— day of March, 1902.

Notary Public in and for Salt Lake County, State of Utah.

COPY OF RESOLUTIONS AUTHORIZING THE EXECUTION OF CERTAIN SURETY BONDS FOR THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, IN THE STATE OF IDAHO.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held at the office of the Company in Baltimore, Maryland, on the first day of November, 1899, the following resolutions were unanimously adopted, to wit:

Whereas, the Fidelity and Deposit Company of Maryland has been authorized by the Insurance Department of the State of Idaho, to transact the surety business therein; and

Whereas, it is often necessary, in order to facilitate the business of the company in said State, to have bonds in certain cases executed upon application for same; therefore, be it

Resolved, that Alfred Eoff, Nathan Falk, B. S. Howe, H. C. Wyman or Charles A. Clark, all of the city of Boise, State of Idaho, be, and either of them is hereby, authorized to execute and deliver, for and on behalf of the said Fidelity and Deposit Company of Maryland, all bonds required in judicial proceedings in any and all Courts in said State of Idaho and in the United States Circuit and District Courts in said State, to wit, bonds for executors, administrators, trustees, receivers, assignees, guardians, committees for lunatics, in replevin cases, attachment cases, injunction cases, appeal cases, bonds for security for costs, and any and all other bonds required to be given by order or decree of any court of law or equity, of the State of Idaho or the United States Circuit and District Courts for said State; the same to be attested by Sherman G. King, who shall attach the seal of said company to the undertaking or bond so executed. And any such bond, so executed, shall be binding upon the said Fidelity and Deposit Company of Maryland, to all intents and purposes, as fully as if done by the regular officers of the company in their own proper persons in its behalf.

We, ————, President, and H. E. Bosler Secretary of the Fidelity and Deposit Company of Maryland, hereby certify that the aforegoing is a true copy taken from the records of proceedings of the Board of Directors of the Fidelity and Deposit Company of Maryland.

In testimony whereof, we have hereunto subscribed our names as President, and Secretary, respectfully, and affixed the corporate seal of the Fidelity and Deposit

Company of Maryland, this first day of November, A. D. 1899.

_____,
President.

[Seal] H. E. BOSLER,
Secretary.

State of Maryland, City of Baltimore. } ss.

On this 1st day of Nov. A. D. 1899, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified came————, President, and H. E. Bosler, Secretary of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed the preceeding instrument, and they each acknowledge the execution of same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal at the city of Baltimore, the day and year first above written.

[Seal] FRED S. AXTELL,
Notary Public.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al. vs. Thomas G. Lowe et al. Appeal Bond. Filed April 8, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRIAM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Order Allowing Appeal.

This 8th day of April, 1902, came the plaintiffs, by their

attorneys, and filed herein and presented to the court their petition, praying for the allowance of an appeal intended to be urged by them, praying also that the transcript of the record, proceedings and papers upon which the order and decree sustaining the defendants' demurrer to the plaintiffs' bill in equity was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the said appeal to the said plaintiffs upon the plaintiffs giving a bond according to law in the sum of $500.00, which shall operate as a supersedeas bond.

JAS. H. BEATTY,

Judge of the Circuit Court for the District of Idaho.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al. vs. Thomas G. Lowe et al. Order Allowing Appeal. Filed April 8th, 1902. A. L. Richardson, Clerk,

In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRIAM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, ISAAC J. FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Praecipe for Transcript.

To A. L. Richardson, Clerk of said Court:

You will please, with all convenient speed, prepare transcript in the above-entitled cause of the reco

thereof on appeal of the said plaintiffs to transmit to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and you will embody therein the pleadings in said cause, and the orders and decree entered therein sustaining the defendants' demurrer and dismissing the plaintiffs' appeal in equity, and all other proceedings relating thereto and this appeal.

JAMES H. MOYLE,
LINDSAY R. ROGERS,
ARTHUR BROWN,
Attorneys for Plaintiffs and Appellants.

[Endorsed]: No. 68. United States Circuit Court, Southern Division, District of Idaho. Jesse M. Smith et al. vs. Thomas G. Lowe et al. Praecipe for Transcript. Filed April , 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho.

JESSE M. SMITH, EPHRAIM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HANS S. NEILSON, HEBER A. SMITH, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, ISAAC FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER,

Complainants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE and RICHARD ROE, Whose Other or True Names are Unknown,

Defendants.

Citation.

To Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe, and Richard Roe, Whose Other or True Names are Unknown, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the date this citation appears dated, pursuant to an appeal allowed and filed in the clerk's office of the Circuit Court of the United States for the Ninth Circuit, District of Idaho, wherein Jesse M. Smith, Ephraim P. Ellison, Elias Adams, John W. Thornley, James W. Chipman, James Love, Anthon J. Neilson, Benjamin R. Meek, Peter A. Neilson, Joseph S. Neilson, Hans S. Neilson, Heber A. Smith, Andrew Allen, Ellsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald, Isaac Fitzgerald, Henry Chipman, Benjamin Dansie, Thomas Mercer, William Aylett, Heber Aylett, John A. Egbert, George Dansie, Frank Dansie, William Crane, I. J. Freeman, Joseph R. Olsen, L. Parker, are appellants and you are appellees, to show cause, if any there be, why the order and decree rendered against the said appellants sustaining the defendants' demurrer to the plaintiffs' appeal in equity and dismissing the said appeal as in said appellant's motion, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable JAMES H. BEATTY, United States District Judge for the District of Idaho, and one of the Judges of the Circuit Court of said District, this 8 day of April, A. D. 1902.

JAS. H. BEATTY,

Judge of Circuit Court for the District of Idaho.

I hereby, this 25th day of April, 1902, admit due personal service of this citation on behalf of the defendant above named and appellees therein.

FRANK MARTIN,
Attorney for Appellees.

[Endorsed]: No. 68. United States Circuit Court, District of Idaho. Jesse M. Smith et al., Plaintiffs, vs. Thomas G. Lowe et al., Defendants. Citation. Filed on return, April 25th, 1902. A. L. Richardson, Clerk.

Return of Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[Seal] A. L. RICHARDSON,
Clerk.

In the United States Circuit Court, Ninth Judicial Circuit, District of Idaho.

JESSE M. SMITH et al.,
Plaintiffs,
vs.
THOMAS G. LOWE et al.,
Defendants.

Clerk's Certificate to Transcript.

I, A. L. Richardson, clerk of the Circuit Court of the United States, in and for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 47, inclusive, to be a full, true and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $33.30, and that the same has been paid by the appellant.

Witness my hand and the seal of said Circuit Court affixed at Boise, Idaho, this 28th day of April, 1902.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 837. In the United States Circuit Court of Appeals for the Ninth Circuit. Jesse M. Smith, Ephraim P. Ellison, Elias Adams, John W. Thornley, James W. Chipman, James Love, Anthon J. Neilson, Benjamin R. Meek, Peter A. Neilson, Joseph S. Neilson, Heber A. Smith, Hans S. Neilson, Andrew Allen, Ellsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald, Henry Chipman, Benjamin Dansie, Thomas Mercer, William Aylett, Heber Aylett, John A. Egbert, George Dansie, Frank Dansie, William Crane, I. J. Freeman, Joseph R. Olsen, L. Parker, Appellants, vs. Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe, and Richard Roe, Whose Other or True Names are Unknown, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Idaho.

Filed May 8, 1902.

F. D. MONCKTON,
Clerk.

No. 837

IN THE

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

JESSE M. SMITH, EPHRAIM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HEBER A. SMITH, HANS S. NEILSON, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER.

Appellants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Appellees.

APPELLANTS' BRIEF.

Upon Appeal from the United States Circuit Court for the District of Idaho.

JAMES H. MOYLE,
BROWN & HENDERSON,
LINDSAY R. ROGERS,
Attorneys for Appellants.

DAILY REPORTER PRESS, SALT LAKE.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 837.

JESSE M. SMITH, EPHRAIM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NIELSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NIELSON, HEBER A. SMITH, HANS S. NEILSON, ANDREW ALLEN, ELSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER, ISAAC FITZGERALD,

Appellants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE and RICHARD ROE, Whose Other or True Names Are Unknown,

Appellees.

THE FACTS.

The issue in this case is, as to whether or not the State of Idaho can, under the pretense of a quarantine law, completely exclude the sheep of non-residents of the State

from grazing sheep on the unoccupied unclaimed lands of the Federal Government, herein referred to as the Public Domain, in that State; or in other words, can the live stock growers of the State of Idaho. with the aid of willing State Officials, secure for themselves a monopoly of the grass growing upon the public domain of the general government in that State.

The lower court held that the complaint of the plaintiffs and appellants did not state a cause of action, because the acts complained of were performed under and in pursuance of the sheep quarantine laws of the State of Idaho. (Trans. p p. 24-30.)

The only question argued or considered or decided in the lower court, was whether the complaint stated a cause of action; and we will therefore, not presume to burden the court with an unnecessary discussion of any other question at this time.

The complaint contains the facts. It alleges that the appellants are citizens of the State of Utah, and that the defendants are citizens of the State of Idaho. That the appellants are the owners of 72,500 head of sheep of the value of $350,000.00, which sheep they had theretofore for years grazed during the Spring, Summer and Fall of the year in the States of Idaho and Wyoming upon their own land, and upon the public domain or lands of the general government; and that in the winter time and the early spring, they ranged these sheep on the Desert in Utah and Nevada, but chiefly in the County of Box Elder, in the State of Utah, which County constitutes the greater part of the Northern boundary of the State of Utah. The prohib-

ited Counties of Utah constitute the entire North boundary of Utah and South boundary of the State of Idaho. That at the time the action was filed, March 21st, 1901, these sheep were in said Box Elder County near the Idaho line, and on the border of said Desert and were endeavoring to pass over said line into the State of Idaho for the purpose of obtaining pasturage on the said public domain and upon the land of their owners in the State of Idaho and Wyoming. (Trans. pp. 3 and 4.)

That the sheep are wholly dependent upon the Winter snows for water while on said Desert, and in said County, where they were at the time said action was brought. That if said sheep were detained where they then were, or prevented from passing on to their said Spring and Summer range in the States of Idaho and Wyoming, they would be destroyed, and would die for the want of water and feed neither of which could be obtained where they were then, or where they had come from on said Desert, so that there was no opportunity for retreat. (Trans. pp 2-10.)

The court will also take judicial notice of the fact that millions of sheep are grazed on said Desert in the Winter and are compelled to leave the same as soon as the snow has melted and enter the valleys and mountains on the North and East of said Desert during the time included within the proclamation herein referred to. That said Box Elder County is practically the sole gateway for sheep wintered on the Desert and summered in Idaho and Wyoming, and the time stated in said proclamation the only time such sheep can or will attempt to pass through

this gateway. Hence the proclamation while limited to forty days is just as effectual against transfering these sheep and other sheep so wintered from passing from said winter range to the Spring and Summer range as if it covered the entire year, for the reason that said sheep would all be dead at the expiration of the forty days, if they were not transferred from their winter range during that time. (Trans pp. 4-5-10.) That if said sheep could by any practical means be transferred to any other available range than that included in the State of Idaho, which is the only range within the reach of these sheep and which is open to them, it would after the expiration of said forty days be wholly impractical and at an irreparable loss to transfer said sheep to their usual range in the State of Idaho. It will also be understood that sheep grazed on the Desert in Utah and Nevada are so grazing upon the public domain and are cared for in herds of from two to three thousand, which sheep in the Spring are driven into the valleys and mountains where grass and water can be found in the Spring and Summer, chiefly upon the public domain; and that these sheep have certain seasons for lambing, and can only be lambed at certain places, and if large numbers of these sheep were attempted to be transferred to new ranges, all of which are occupied by other sheep, it would result in their being so crowded that general destruction would result therefrom. It is also a well known fact that the only outlet from the range on the Northern end of the Desert in Northern Utah and Nevada, is through Box Elder County and Idaho to Wyoming. (Trans. pp. 2, 3, 4, 10 and 11.)

That the appellants were and had been endeavoring to drive their sheep over the said public domain from the State of Utah into the State of Idaho on their way to the States of Idaho and Wyoming, but were prevented from so doing by the defendants. (Trans. p. 6.)

That about one-third of these sheep were also on their way to the eastern market in the States of Nebraska, Missouri and Illinois. That it was necessary for them to have feed which according to the customary way of raising sheep in that locality could only be obtained profitably by grazing on the public domain. That if they were not prevented by the defendants, they would so transport their sheep from the State of Utah through the States of Idaho and Wyoming to the said markets, and that the balance of said sheep would lamb in the States of Idaho and Wyoming and be grazed therein during the summer, and without said privilege appellants would be irreparably damaged. (Trans. pp. 3, 4, 5, 6, 11, 12.)

The complaint further alleges that the Appellees and their confederates and their agents were so preventing the Appellants from driving their sheep into the State of Idaho in order to obtain for themselves and those associated with them the exclusive use of the said public range in the State of Idaho and the grass growing upon the lands of the government of the United States therein. (Trans. pp. 6 and 11.)

That if the appellants drive their sheep into the State of Idaho upon the said public domain, the Appellees threaten to, and unless restrained, will force said sheep back where they then were upon said desert, where there is

no feed or water, and in so doing will cause their ewe sheep, of which there are many, to prematurely lamb and die, to the damage of the appellants in the sum of $350,-900.00, (Trans. pp. 3, 4, 6, 10, 11, 12,) and that for so forcing said sheep back on to said Desert, said defendants threaten to, and unless restrained from so doing, will take the same with force and appropriate them to their own use and benefit, without any warrant or authority therefor and without due, or any process of law. (Trans. pp. 6, 7, 8, 9, 10, 11 12.)

That the said alleged authority of the defendants for their acts is contained in Exhibits "A" and "B," (Trans. pp. 15 and 18,) which exhibits consist of a legislative act of the State of Idaho against diseased sheep and a proclamation of the Governor of the State of Idaho.

That the facts alleged, and which are claimed to exist and which are referred to in said Proclamation as reasons for making said Proclamation are false, are groundless, and were given to said Governor, if he has received the same, for the sole purpose of inducing him to assist the Appellees, their associates and confederates in obtaining for themselves a monopoly of the grazing lands on the public domain of the United States. (Trans. 6, 9.)

That the said sheep of the appellants were free from scab and the districts referred to in said proclamation and through which said sheep had traveled and been grazed were free from scab and diease of all kinds. Trans. pp. 6, 8, 9 and 10.)

That the laws of the United States provide for the inspection and quarantine of such sheep passing from one

state to another, and for the suppression of the diseases referred to in said proclamation and law of the State of Idaho. That the Federal Government employs inspectors of sheep, who inspect sheep passing from one state to another, and determine whether such sheep are infected with disease, and particularly the disease known as scab or scabbie. That said inspectors had and were then inspecting said sheep, and that the appellants had caused said sheep to be so inspected in conformity with the laws of the United States; and that said inspection disclosed that both said sheep and the range upon which they then were and had been were free from disease, and particularly the disease of scab or scabbies. (Trans. pp. 8 and 9.)

That the said defendants are financially irresponsible. (Trans. p. 7.)

The question presented then is as to whether the action of the Governor of the State of Idaho in making said proclamation is final and conclusive, and cannot be questioned irrespective of the motive or purpose behind it, or the gross wrong which is attempted, or may be attempted to be accomplished through the executive department of the State, however unwise or vicious it may be.

ASSIGNMENT OF ERRORS.

1st. That the Court erred in sustaining the said demurrer interposed to the plaintiffs' said bill in equity.

2nd. That the Court erred in dismissing the plaintiffs' said bill and refusing to grant the plaintiffs the relief prayed for in said bill.

ARGUMENT.

The appellants insist that the quarantine law in question and the proclamation of the Governor of Idaho, as construed and applied and the acts of the appellees are in violation of the following provisions of the Constitution of the United States, to-wit:

1. That portion of Sec. 8, Art. 1, to-wit: "To regulate commerce among the several states."

2. Sec. 2, Art. 4: "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

3. The following portion of Fourteenth Amendment to the Constitution: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

I.—REGULATION OF COMMERCE.

The most important question presented, and asked to be determined by the Appellants, is as to whether the Statute and Proclamation in question, as construed, and the action alleged to be exercised thereunder, is a just and lawful exercise of State power, or whether they are, as contended by Appellants, a mere subterfuge and roundabout means adopted to invade the domain of Federal Authority; and if it be such subterfuge, should or could

the lower court inquire into, and determine whether the Executive officers of the State were acting in reason and good faith, and not in violation of the Constitutional right of the Appellants.

The lower court seems to have acted upon the theory that it was without jurisdiction to inquire into the good faith of the State officers or the reasonableness of their action. That the court could not go behind the Statute of the State and the Governor's Proclamation. That they were final and conclusive, and beyond the reach of Federal or other judicial action. But while the lower court appears to follow the above view, it at the same time, admits that the grossest of wrongs may result therefrom and Inter-state commerce be unjustly interfered with and that the decisions of the Supreme Court of the United States have declared the law to be, "*that under the guise of either a proper quarantine or inspection law a regulation of Commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. It is the Character of the Circumstances which gives or takes from a law or regulation of quarantine a legal quality.*" (Trans. pp. 28, 29, 30.) Thus the trial court quotes the law correctly, but ignores it in entering judgment.

That the court has jurisdiction to inquire into the facts, and determine whether the quarantine law and regulations and action thereunder are unjust, or a mere pretense or masquerade under which to regulate commerce and defect the rights of the Appellants, we quote from and cite the following cases:

"In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power, or is intended by round-about means to invade the domain of Federal authority this court will look into the operation and effect of the statute to discern its purpose."

Compagnie Francaise vs. The State Board of Health, La.

No. 16, July 15th, 1902, page 812, Advanced Sheet of the U. S. Sup. Ct. Rep's. Law Ed.;

46 Law Ed. of the U. S. Rep. 816;

Smith vs. St. Louis & South-western R. Co., 181 U. S. 248, 257;

Henderson vs. New York, 92 U. S. 259, 265;

Hanibal, St. Joe R. R. Co. vs. Husen, 95 U. S. 465;

Chy Lung vs. Freeman 92 U. S. 275;

State vs. Duckworth (Idaho) 51, Pac. Rep. 456;

Canon vs. New Orleans 20 Wall. 577.

In Smith vs. St. Louis and South-western R. Co., 181 U. S. 257, the court said, *"What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained."* Such being the law it is difficult to understand why the trial court, in view of the

facts alleged, should have had any doubt about the sufficiency of Appellants' complaint.

It appears, however, from the written decision of the trial court (Trans. pp. 25, 26 and 27,) that before passing on the demurrer, a hearing was had and evidence taken on the application for a temporary injunction, and that at the hearing the court regarded the complaint as sufficient, and found that the sheep were not diseased, and that the forty days restriction was unnecessary, as two dippings of the sheep for scab about ten days apart was sufficient to completely destroy the disease and the parasite from which it arises. That the sheep should be permitted to pass into the State of Idaho, and that the Appellees should be restrained from interfering with the sheep, but that since the commencement of the action and said hearing, and prior to formerly passing on said demurrer, two decisions of the Supreme Court of the United States had been rendered, namely, (Rasmussen vs. Idaho 181 U. S. 198 and Smith vs. St. Louis and South-western R. Co., Id. 248), which decisions changed the opinion, or the action of the court. The lower court said, in rendering its decision, while "these decisions do not say that a Federal Court may not, in such cases, entertain jurisdiction for the purpose of determining the good faith both of the law and its enforcement, and while in the one case it is said that such a law cannot be made a mask to shield a violation of the inter-state commerce constitutional provision, *in both there is an intimation that when the law upon its face is one to prevent the spread of disease in the State, the State officers may be relied upon to, in good*

faith, enforce it in justice to all. At any rate, in the two cases above examined, the laws and their enforcement by the State officers were sustained, and such laws and such enforcement thereof were as strong in exclusion of foreign stock as is the law in the case under consideration. It must follow, therefore, that this law may be enforced by the State officers; that the complaint does not state a cause of action which this Court may take jurisdiction, and the demurrer thereto is sustained." (Trans. pp. 29, 30.) Thus the court was of the opinion that the law was against the Appellees, but said decisions protected them.

It thus appears that said decisions were controlling in the judgment of the trial court, and in effect determined that no matter what the wrong might be, so long as it masqueraded under the guise of a quarantine law of a State it cannot be investigated, or the action of State officers thereunder be defeated, because it is conclusively presumed and cannot be questioned, *that State officers may be relied upon to, in good faith, enforce quarantine regulations, no matter what they may be,* so long as they are declared by executive officers to be intended for the good of the State and the suppression of disease.

This conclusion is in direct opposition to every decision on the question, and no decision can be found to sustain any such a conclusion, but on the contrary the decisions above, including the decision to which the lower court referred, announces a contrary doctrine.

In the case of Rasmussen vs. Idaho 181 U. S. 198, the only question raised was whether the unconstitutionality of a law of Idaho was disclosed on its face, while it au-

thorized a similar proclamation. The question of good faith, or the unconstitutional application of the law, however, was not raised. It must be borne in mind, too, that the Supreme Court of the United States subsequently and at the same term said, in Smith vs. St. Louis & South-western R. Co. 181 U. S. 248, that "What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared" by this Court. That question had not been considered by that court.

And its last expression on that question is as follows: "It will be time enough to consider a case of such supposed abuse when it is presented for consideration."

Campagnie Francaise vs. State Board of Health 46 U. S. (L. Ed.) 817.

Such is also the law as construed in State of Idaho vs. Duckworth, 51 Pac. Rep. 456.

It is clear that this question was never presented to the Supreme Court, and unless it disregards all its former decisions, no violation of the Constitution will be permitted under the mere guise of a quarantine law.

In the case of Smith vs. St. Louis & S. W. R. Co., an entirely different condition exists There the States of Texas and Louisiana are involved, and it is a notorious fact that all live stock in parts of those States are subject to a disease which is common, and epidemic, especially in certain localities. That it then existed or was believed to exist in such a way as to require quarantine regulations, and of that fact the Court took judicial notice. But in that case the absence of the good faith of the law or proclamation or the officials or their action was not established, if

questioned The sole question involved was the constitutionality of the law itself, and the order of the Sanitary Commission providing for the quarantine, with no presumption of good faith rebutted. That such is the case, is clearly disclosed, for the Court said, "It is urged that it does not appear that the action of the live-stock Sanitary Commission was taken on sufficient information. It does appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances, or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstances would have to be shown to sustain the quarantine, as was said in Kimmish vs. Bell, 129 U. S. 217, 32 L. Ed. 695, 2 Inters. Com-Rep. 407, Sup. Ct. Rep. 277. It is for the Breach of this alleged duty he sues; yet it no where appears from the record that before the quarantine line in question was established the sanitary commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into. *So far as the record shows every animal of the kind prohibited in the State of Louisiana may have been actaully affected with charbon or anthrax;* and it is conceded that this is a disease different from Texas or splenetic fever, and that it is contagious and infectious and of the most virulent character."

From the foregoing it is apparent that no attempt even was made to prove that the alleged facts warranting the quarantine did not exist, or that the officers were not acting in good faith. How this case could have misled the lower court, as it seems to have done, is hard to understand. In State vs. Duckworth, just cited, the Court recognized the distinction we make when it said, page 458, "In other words, the sheep of our neighboring states are no more the natural habitat for scab, or other infectious diseases to which sheep are subject, than are Idaho sheep. *Those facts distinguish the case at bar from those cases in which the constitutionality of laws aiming to protect the cattle of certain states from the ravages of the disease commonly known as 'Texas fever' is involved. It is recognized that Texas cattle are the natural habitat for said disease, and if they are excluded from a state, as well as cattle that have come in contact with them, the disease is wholly prevented. It is thus shown that that class of cases is distinguishable from the case at bar.* The enactment of a similar statute to the one under consideration, by the states of Wyoming, Nebraska, Iowa and Illinois, would result in closing the market of Kansas City, Omaha and Chicago, to the sheep growers of our state."

In Grimes vs. Eddy (Mo) 28 S. W. Rep. 756, the court said it would "take judicial notice of the fact that Texas Cattle have some contagious or infectious disease communicable to native cattle."

The Appellants rely on the bad faith of the officers and the total absence of facts warranting any quarantine regulation. It is conceded in the absence of an answer to

the complaint that both the sheep in question and the prohibited range from which they came were free from disease, and even the lower court says that two dippings ten days apart is sufficient to exterminate the disease against which the quarantine was laid, namely, scab or scabbies. (Trans. pp. 8, 9, 10, 11.)

The Supreme Court of Idaho had also previously decided that two dippings for scab, ten days apart, is sufficient to destroy the disease. That it breaks out in sores within ten days after exposure, and two dippings cures it. That it is easy to discover the existence of the disease.

State vs. Duckworth, 51 Pac. Rep. 456, 458.

The Proclamation entirely excluding non-resident sheep lasted forty days, in spite of the fact that ten days quarantine was sufficient.

It is also likewise admitted that the Idaho quarantine regulation is solely intended for the purpose of unlawfully enabling the Appellees and their confederates to monopolize and exclusively use and graze their sheep on the grass growing on the unclaimed lands of the United States. (Trans. p. 6.)

If this be true, and it is not yet challenged, what could be a more unjustifiable and manifest violation of Constitutional rights, say nothing of official decency?

The quarantine regulation in question can scarcely be said to be a pretense or masquerade, it is practically on a par with the action of the bold highwayman. The lower court certainly overlooked, or did not take this undenied allegation seriously.

The important question then is, does the Appellants' Bill allege, that the Law or the Proclamation, or the Law and Proclamation as construed and applied, disclose a "just exercise of State power, or is it a mere pretense and round-about means of invading the domain of Federal authority?"

It must be conceded that the latter conditions exist if the allegations of the complaint are true, and as they are not denied, they cannot be controverted in this court.

While the line between such a constitutional and unconstitutional inter-state quarantine has not been expressly and technically determined, the Supreme Court of the United States and some of the State Courts have, in a variety of cases, declared less offensive and exclusive quarantine regulations unconstitutional.

We maintain the law to be that a quarantine or police regulation, which prohibites or unnecessarily restricts the transportation of live stock into a state, except where the same is in fact a necessary quarantine regulation, is an unconstitutional interference with inter-state commerce, and such is the case, however much it masquerades under the mere guise or false pretense of a necessary quarantine regulation.

Hanibal & St. J R. Co. vs. Husen, 95 U. S. 465, 24 L. Ed. 527.

State vs. the Constitution 42 Cal. 578.

Bangor vs. Smith 83 Me. 422; 13 L. R. A. 686, 22 Atl. 379.

The *Husen* case is recognized as the leading case on the subject. It has never been criticised or reversed, but

has been followed and cited in a long line of cases, for a list of which see 9 Roses Notes of U. S. Reps. 287 to 293.

If the regulation does in fact unnecessarily interfere with commerce, or is a quarantine regulation only in name, and is intended in fact to exclude or interfere with interstate commerce, or to secure an undue advantage in favor of one class of citizens as against another, even though it is declared by state officers to be a necessary quarantine regulation, its true purpose and effect will be discovered by judicial inquiry, and if unlawful, defeated.

Henderson vs. New York 92 U. S. 259.

State vs. Duckworth (Idaho) 51, Pac. Rep. 456.

Chy Lung vs. Freeman 92 U. S. 275.

Hanibal St. J. R R. Co. vs. Husen 95 U. S. 465.

In State vs. Duckworth, just cited, the Supreme Court of Idaho held a less objectionable law unconstitutional, and said:

"Under the guise of inspection and quarantine, said sections place unnecessary burdens and restrictions upon bringing sheep into this state for any purpose whatever, or transporting them through the state to the markets of the East, and make unnecessary and prejudicial discriminations against sheep whose owners may desire to bring them into the state; and they are repugnant to the provisions of the federal constitution. Said sections are void for that reason."

We have previously shown that the Idaho quarantine regulations, while only lasting forty days, were just as ex-

clusive as if they had lasted for twelve months. (Trans. pp. 3, 4, 5, 6, 8, 9, 10.) In this connection we call special attention to the following sentence contained on page 10 of the Transcript, to-wit:

"That sheep are transported from said alleged infected and prohibited districts only during the said prohibited season, and through the said prohibited counties of Utah."

While some cases hold that a state can enforce reasonable quarantine and inspection laws, necessary for the protection of the property of its citizens, even though it may to some extent interfere with inter-state commerce, no court has held that it can prevent the transportation of live-stock, or other subjects of commerce beyond that which is actually and in fact necessary for its self protection.

Hanibal & St. J. R. Co. vs. Husen 95 U. S. 465.

Brimmer vs. Rebman, 138 U. S. 78.

Scott vs. Donald, 165 U. S. 58, and cases cited therein.

Grimes vs. Eddy, 26 L. R. A. 638.

Bowman vs. Chicago & N. W. R. Co. 125 U. S. 488.

In Hanibal & St. J. R. Co. vs. Husen, 95 U. S. 465, 471, 473, a Missouri statute, was held unconstitutional. It provided that no Texas, Mexican or Indian cattle, not kept the entire previous winter in the State of Missouri,, should be driven or otherwise conveyed into or remain in any county of that state between the first day of March and the

first day of November in each year. In that case the court admitted, however, that a statute would be constitutional, which excluded property dangerous to property of citizens of the state, such, for an example, as animals having contagious or infectious diseases. The decision was placed on the ground, that while contagious or infectious animals could be excluded, the state could not, under the claim of exercising its police power, substantially prohibit foreign or inter-state commerce. The Missouri statute was also held unconstitutional because it went beyond the necessities of the case, it having been drawn so as to practically exclude Texas, Mexican or Indian cattle from the state, whether free from disease or not, or whether they would or not injure the inhabitants of the state. In that case it was also claimed in behalf of the Missouri law, that it was valid as a quarantine or inspection law, as its purpose was to prevent the introduction of cattle afflicted with contagious diseases. But the court pointed out that no provision was made for the actual inspection of the cattle so as to secure the rejection of those only that were diseased. The court held that the statute was void as a plain intrusion upon the exclusive domain of Congress. Both the letter of the decision and the reason upon which it was based applies equally to the Idaho law. The decision referred to has been quoted and referred to approvingly in a great number of cases since, and in no case has it been overruled or criticised.

In Bowman vs. Chicago R. Co., 125 U. S. 488, the court held a state law prohibiting the importation of liquor without a certificate that the consignee was a licensed dealer.

was not an inspection law, but a regulation of commerce and unconstitutional.

A burden or restriction imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all states, including the people of the state enacting such statute.

Scott vs. Donald 165 U. S. 98 and cases therein cited.

EQUAL PRIVILEGES DENIED.

The Proclamation, while excluding absolutely the driving of sheep into the state, and which is the usual means of transporting sheep in the locality in question, permits and gives at the same time a special privilege to the railroad companies to transport sheep from the prohibited and alleged infected districts or elsewhere into the state, and such sheep need only be quarantined for fifteen days, and that after they are in the state. (Trans. p. 17. This recognizes a fifteen days quarantine as sufficient to stamp out the disease.

This is clearly a violation of the Fourteenth Amendment to the Constitution of the United States. Its manifest purpose is to hold the good will of the railroad companies, and to prevent their joining in a contest against the state and its favored stockmen.

But whether such is its purpose or not, it is an unwarranted discrimination in favor of the business of the railroad, and the sheepmen who are able or so situated that they can transport their sheep into the state by rail.

The lower court completely overlooked this matter in its decision at least.

If, as alleged and admitted, the quarantine is established for the purpose of securing free grass for Idaho stockmen (Trans. pp. 6, 9, 10) then it is an unconstitutional discrimination.

TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.

Said law provides that whenever the Governor's proclamation prohibits sheep from entering the state, irrespective of whether they are diseased or not, "it shall be the duty of the State Sheep Inspector, or any of his deputies, to drive or transport sheep coming into the state, in violation of said proclamation, back across the state line from which they came, using all necessary force in so doing; provided, that the said sheep inspector or his deputies may employ such assistance as may be necessary for the enforcement of the provision of this act; and the costs of such deportation shall be a lien upon said sheep; provided, that if the fine and costs in this act provided shall not be immediately paid, the deputy sheep inspector shall retain a sufficient number of said sheep to pay such fine and costs, which sheep shall be sold to pay the same, by the deputy sheep inspector, in the same manner as provided by law for the sale of personal property to satisfy a judgment, and for such services the deputy sheep inspector shall receive and retain such fees as is allowed sheriffs for like services to be taxed as costs." (Trans. p. 19.)

Said act further provides as follows: "Any person failing or refusing to assist said deputy sheep inspector, as in the preceding section provided, shall be punished in a sum not exceeding $1,000.00."

The Appellees threatened the appellants that if they drove their said sheep into the state that they would employ an army of men, if necessary, to drive them back, and retain so many of the sheep as was necessary to pay the expense of so keeping said sheep out of the state. And Appellants allege that if not restrained, the Appellees would so act. (Trans. pp. 6, 8, 11.) No provision was made in this law for determining what the lawful costs were, except that upon a sale of the sheep by the inspectors they should make their charges the same as those allowed sheriffs. No writ or other authority is required to take the sheep, except this law. No provision is made to regulate the charges for driving the sheep out of the state. The inspectors are thereby authorized to take as many men as they conclude is necessary. There is absolutely no limitation on the expense that may be incurred, excepting costs of sale. The inspectors are evidently authorized to enter judgment in their own minds or elsewhere as they please, fix the amount to be charged, and that becomes a judgment lien on the sheep, and if it is not paid (and no time is fixed within which to pay, and no provision is made for notice or demand to be given or made), the inspector sells the sheep the same as he would if he was sheriff and had a lawful writ authorizing the sale.

No opportunity is given to retax the costs or to contest the judgment of the inspectors; in fact, it is not even nec-

essary for the trespassing sheep owner to know what the judgment is, or how it is to be determined. He is denied his day in court. He must promptly pay whatever is demanded. The right of appeal and trial by jury is ignored and totally denied. And the judge may be an avowed enemy and opponent.

An army of citizens of Idaho are to be employed in forcing back the invading sheep (Trans. pp. 8, 11), and they are to be paid out of the proceeds of the sale of the sheep before any judgment is made by any judicial tribunal, known to the law. Even the Constitution and laws of Idaho confine the exercise of judicial functions to certain courts not including sheep inspectors, many of whom can scarcely read the law or anything else. To know a scabby sheep when they see it is their only qualification.

If this is not an attempt to take property without due process of law, what would be?

As alleged in the complaint, the Appellees and their confederates threaten to attempt to carry out the provisions of said law, and will, unless restrained. (Trans. pp. 11, 19.)

The law authorizing the quarantine, seizure and confiscation of sheep as stated above, is in violation of the constitution of Idaho, which limits the exercise of judicial functions to certain courts, neither of which can possibly include the State Inspectors Court or that of any of his deputies.

Sec. 2, Art. V, Constitution of Idaho.

CONFLICTS WITH FEDERAL LAW.

While the states may be permitted to protect their domestic cattle from contagious diseases, they cannot displace or duplicate the regulations provided by Federal legislation. Congress, in so far as it acts in matters of fecting inter-state commerce, is supreme. Congress having acted and Federal officers, in pursuance of an act of Congress, having inspected the sheep in question and the range from which they came, and having found the same free from disease, and certified to the fitness of the sheep for inter-state commerce, (Trans. pp. 8, 9), by what authority or process can a state inspector at the same time and place find the same sheep diseased and not fit for inter-state commerce, and prohibit such sheep from crossing state lines, on the ground that they are diseased or the range from which they came is diseased, and this, too, in the face of the fact that it is conceded that the sheep and range in question are free from disease.

That Congressional action does supercede state quarantine regulations and is supreme.

See Missouri K. & T. R. Co. vs. Haber, 169 U. S. 613, and cases therein cited.

State vs. Duckworth (Idaho) 51 Pac. Rep. 456.

Gibbons vs. Ogden 9 Wheat. at page 210.

Henderson vs. Mayor 92 U. S. 272.

Campagnie Francaise vs. State Board, 46 U. S. L. Ed. 815.

Congress has provided inspection and quarantine regulations for inter-state transfer of live stock, including sheep.

Sections 6, 7, 8, 9, of the Act of Congress of May 29th, 1884 (23 Stat. at L. 31, Chap. 60.)

Sections 1, 2, 3, 5, of the Act of March 3rd, 1891, (26 Stat. at L. 1044, 1049 Chap. 544, Entitled an Act to provide for the Inspection of live stock, etc., when the subject of inter-state commerce.

An Act making apropriations for the Department of Agriculture of March 2, 1895.

Act of Feb. 9, 1889. (25 Stat. at L. 659, Chap. 122.)

Act of March 2, 1889. (25 Stat. at L. 835, 840, Chap. 373.)

Act making Apropriations for the Agricultural department of July 18, 1888, (25 Stat. at L. 228, Chap. 677.)

Rules and Regulations for the Suppression and Extirpation of Contagious, Infectious and Communicable Diseases Among the Domestic Animals of the United States. Issued by the Commissioner of Agriculture, April 14, 1887, page 32, Bulletin No. 9, U. S. Department of Agriculture of the Bureau of Animal Industry.

Order of the Secretary of Agriculture dated December 13, 1895, entitled "Regulations Prohibiting the Transportation of Animals Afflicted with Hog Cholera, Tuberculosis, or Sheep Scab."

Order Secretary of Agriculture dated June 18, 1897, entitled "Transportation of Sheep Affected with Scabbies."

Order of the Acting Secretary of Agriculture, dated

July 20, 1899, entitled "Regulations Concerning the Dipping of Sheep Affected with Scabbies."

It is true that the Haber case just cited upheld a State statute providing that a railroad company was liable for all damages caused by bringing diseased cattle in contact with other cattle, even though in so transporting such diseased cattle the regulations of the Federal Government were complied with.

But in the Haber case the court said, in discussing the Husen case, that the Kansas statute was not subject to the objections to the Missouri statute for the reason that it did not exclude Texas cattle; it merely made those who brought cattle into the State from Texas, liable for the damage caused by the disease which such cattle imparted to others. This liability was based on the theory that while it might not be known that such cattle were diseased when transported, it was known as stated in the Idaho case. (State vs. Duckworth 51 Pac. Rep. 456 at 458) "that Texas cattle are the natural habitat for said disease."

The Supreme Court of Idaho, in said Duckworth case, went farther and said, citing the decision in Welton vs. Missouri, 91 U. S. 275, (which held the law to be the same) that "it has been held that the non-exercise by Congress of its power to regulate commerce among the States is equivalent to a declaration by that body that such commerce shall be free from any restriction."

In conclusion, we insist that the law in question is unconstitutional on its face, because it provides for taking property without due process of law.

That the Proclamation is unconstitutional because it discriminates against and deprives citizens of the State of Utah the privilege of grazing their sheep on the public domain of the Federal Government in the State of Idaho for the purpose of giving that privilege exclusively to citizens of the State of Idaho. It is also unconstitutional for the reason that it discriminates against and deprives citizens of the United States of the equal protection of the law. It is also unconstitutional because it gives the privilege of transporting sheep by rail into the State of Idaho, and denies to those unable to use the railroad, the privilege of transporting sheep into Idaho.

That both the Law and Proclamation and the actions of said Appellees are unconstitutional, for the reason that they violate the inter-state commerce provisions of the Constitution of the United States.

That the actions of the Appellees are unconstitutional for all of the reasons above stated.

The Appellants, believing in the justice of their cause, demand the reversal of the decision of the trial court.

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NO. 837

IN THE

United States Circuit Court

Of Appeals

FOR THE NINTH CIRCUIT

Jessie M. Smith, Ephrain P. Ellison, Elias Adams, John W. Thornley, James W. Chipman, James Love, Anthon J. Neilson, Benjamin R. Meek, Peter A. Neilson, Joseph S. Neilson, Heber A. Smith, Hans S. Neilson, Andrew Allen, Ellsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald, Henry Chipman, Benjamin Dansie, Thomas Mercer, William Aylett, Heber Aylett, John A. Egbert, George Dansie, Frank Dansie, William Crane, I. J. Freeman, Joseph R. Olsen, L. Parker,

Appellants,

vs.

Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, whose other and true names are unknown.

Appellees.

APPELLEES' BRIEF.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF IDAHO.

FRANK MARTIN,
Attorney General,
W. E. BORAH, and
E. J. DOCKERY,
Attorneys for Appellees.

IN THE

United States Circuit Court

Of Appeals

FOR THE

NINTH CIRCUIT

Jesse M. Smith, Ephrain P. Ellison, Elias Adams, John W. Thornley, James W. Chipman, James Love, Anthon J. Nielson, Benjamin R. Meek, Peter A. Nielson, Joseph S. Nielson, Heber A. Smith, Hans S. Nielson, Andrew Allen, Elsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald, Henry Chipman, Benjamin Dansie, Thomas Mercer, William Aylett, Heber Aylett, John A. Egbert, George Dansie, Frank Dansie, William Crane, I. J. Freeman, Joseph R. Olson, L. Parker, Isaac Fitzgerald,

Appellants,

vs.

Thomas G. Lowe, John R. Thompas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, whose other or true names are unknown,

Appellees.

STATEMENT OF FACTS.

This case, so far as our diligent investigation of the books discloses, stands unique and alone not only

in the question raised for determination, but in the form of its raising. Several questions are incidentally discussed by appellants but in fact only one undetermined question is presented to the Court, i. e.: Is it within the province of the Federal Courts to inquire into the sufficiency of the facts and the good faith of the chief executive officer of a sovereign state in issuing a quarantine regulation under a state law declared by the Supreme Court of the United States to be constitutional?

The facts are briefly these: The State of Idaho enacted a law (fully set forth on pp. 18 and 19 of the transcript) which obligated the Governor of Idaho, whenever it came to his knowledge, that diseased sheep of adjoining states were being driven into the state and endangering the health of Idaho sheep, to issue an appropriate quarantine proclamation excluding such sheep until restored to a healthy condition. Under authority of this law and upon information furnished by the State Sheep Inspector after a personal examination, and by affidavits of reputable citizens, the Governor of Idaho on March 9th, 1901, promulgated a proclamation (which is set forth in full on pp. 15 to 17 of the transcript) prohibiting the driving of sheep from the infected regions of Utah, into Idaho, for a period of forty days.

The appellants, residents of Utah, and owners of sheep which had been kept during the winter in the districts designated in the Governor's proclamation, by bill filed March 21st, 1901, in the Circuit Court of Idaho, prayed for the issuance of an injunction to restrain the Idaho officers, the State Sheep Inspector and his deputies, the appellees herein, from enforcing the law and the Governor's proclamation. To this

bill the appellees demurred, which demurrer was sustained by the Honorable Circuit Court from which order this appeal is taken to this Court.

History of the Legislation, by the State of Idaho, in Reference to the Disease of Sheep:

A brief reference to the laws passed by the State of Idaho to protect its flocks from disease may be of interest to this Court in the decision of this case. The Court will no doubt take notice that sheep raising is one of the great industries of the State of Idaho; and its citizens and sheep owners were early impressed with the fact that it was best from a business standpoint to keep their flocks free from the disease of scab or scabbies, which is very prevalent and disastrous among flocks unless great care is taken, as will be shown by an examination of the bulletins issued by the Government Bureau of Animal Industry. Acting upon this idea, the State Legislature in 1887 enacted a law which required the County Commissioners of each county to appoint a Sheep Commissioner who should examine all sheep in his county, and as often as notified by anyone of diseased sheep, and imposed a penalty upon the owner of sheep driving or ranging sheep known to be diseased. Chap. VI., Title VII., Rev. Stats., 1887. This Act was superceded by an Act of the Legislature, approved March 2, 1893, which was much more stringent in its terms and required the Inspector to inspect all sheep in his county between the 15th day of April and the 15th day of May, and as often thereafter as he received information that any sheep in his county were infected with scab or any other disease, and that if he found any disease among any bands of sheep in his county he should quarantine said sheep and hold

them from other sheep until they were cured. It prohibited anyone from herding or driving any infected sheep upon the range or highways and inflicted a heavy penalty upon anyone violating the law. It declared in terms that an emergency existed for the law in consequence of the rapid spread among sheep of contagious or infectious diseases. This law will be found on page 79 of the laws of 1893.

The next legislature of the state, which convened in 1895, created the office of State Sheep Inspector, and passed a still more stringent law, requiring Idaho sheep owners to cure their flocks from disease. Laws 1895, page 124.

The succeeding legislature passed another law upon the subject by which additional care was taken requiring the flocks of Idaho to be inspected, dipped and kept free from disease, and imposing additional penalties for violation of its provisions. Laws 1897, page 115.

The law was again strengthened and additional strictness provided for by and Act of the Legislature approved February 5, 1899. Laws 1899, page 352.

The legislature of 1901 enacted the present law which is found on page 142 of the laws of that session and embodied in the Political Code of the State, 1901 in Chapter XVII., Sections 689 to 710. This law requires the State Sheep Inspector and his deputies to inspect all sheep in the State twice each year, and as oftener as reliable information shall be furnished of disease in any band of sheep. If, on the inspection of any band of sheep, any of them are found to be diseased the inspector or his deputy is required to quarantine said sheep so that the disease

may have no opportunity to spread and require said sheep to be dipped until said disease is cured; and this dipping does not apply to the diseased sheep alone, but to the entire band in which any diseased sheep are found. And in this law the Court will find the most stringent provisions for the protection of sheep-owners from being infected by diseased sheep; and against any person having diseased sheep driving them across the ranges, corralling, or in any other manner coming in contact with other sheep, and the greatest care is exercised to see that the disease is not communicated to other bands; and the said inspector or one of his deputies must be at once notified if any disease is discovered. Heavy penalties are imposed for violation of any of these provisions.

The state found that it could gain but little by requiring its own sheep to be dipped and cleaned of disease, at great expense to the owners, unless it could in some way protect them from the large bands of diseased sheep, numbering hundreds of thousands, driven into the state each year from adjoining states. So in order to protect its flocks from diseased sheep that were brought from other states, where no care was exercised by the state to free them from disease, the Legislature in 1897 passed an Act which required sheep, before entering the state, and when within twenty miles of the state line, to be quarantined and dipped. This law was held to be in conflict with the provisions of the Constitution of the United States in the case of State vs. Duckworth, (Idaho) 51 Pac. 456 by the Supreme Court of Idaho.

In 1899 the Legislature passed an Act, approved March 13th, which was as follows:

H. B. No. 343.

An Act Establishing Quarantine against Diseased Sheep, Prescribing the duties of the Governor in Relation thereto, and Providing Penalties for the Infraction of Its provisions.

Be it Enacted by the Legislature of the State of Idaho:

SECTION 1. Whenever the Governor of the State of Idaho has reasons to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other state or territory, or that conditions exists that render sheep likely to convey disease, he must thereupon, by proclamation, designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as, after consultation with the State Sheep Inspector, he may deem proper.

Any person or corporation who, after publication of such proclamation, receives in charge any such sheep from any of the prohibited districts and transports, conveys or drives the same to and within the limits of any of the counties of this state, is punishable by fine not exceeding $1,000, nor less than $200, and is liable for all damages that may be sustained by any person by reason of the importation or transportation of such prohibited sheep.

SEC. 2. Upon issuing such proclamation, the owners or persons in charge of any sheep being shipped into Idaho, against which quarantine has been declared, must forthwith notify the Deputy Inspector of the county into which such sheep first

come, of such arrival, and such owner or persons in charge must not allow any sheep so quarantined to pass over or upon any public highway, or upon the ranges occupied by other sheep, or within five miles of any corral in which sheep are usually corralled until such sheep have first been inspected, and any person failing to comply with the provisions of this section is punishable as provided in section one of this Act and is liable for all damages sustained by any person by reason of the failure to comply with the provisions of this section.

Sec. 3. Whereas an emergency exists, this Act shall be in force from and after its passage.

Approved, March 13, 1899.

Under this law the Governor of the State on the 12th day of April, 1899, issued the following proclamation:

Whereas, I have received statements from reliable wool-growers and stock-raisers of the State of Idaho, said statements being supplemented by affidavits of reputable persons, all to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities or districts, vis: In the County of Cache, State of Utah; the County of Box Elder, in the State of Utah; and the County of Elko, in the State of Nevada; and

Whereas, It is known that sheep from said districts are annually moved, driven or imported into the State of Idaho, and if so moved would thereby spread infection and disease on the ranges and among the sheep of this state, which act would result in great disaster.

"Now, therefore, I, Frank Steunenberg, Governor of the State of Idaho, by virtue of authority in me vested, and after due consultation with the State Sheep Inspector, do hereby prohibit the importation, driving or moving into the State of Idaho of all sheep now being held, herded or ranged within said infected districts, viz: The county of Cache, in the State of Utah; the County of Box Elder, in the State Utah, and the County of Elko, in the State of Nevada, or which may hereafter be held, herded or ranged within said infected districts, for a period of sixty days from and after the date of this proclamation; after the termination of said sixty days sheep can be moved into this state only upon compliance with the laws of the State of Idaho regarding the inspection and dipping of sheep."

This law and proclamation were before the Supreme Court of the State of Idaho in the case of State vs. Rasmussen, a Utah sheep owner.

State vs. Rasmussen, (Idaho) 59 Pac. 933.

The Court held that the law and proclamation together with its enforcement, which were exactly the same as involved in this case, were a proper quarantine regulation and were not in violation of any of the provisions of the State Constitution, or the constitution of the United States, or the laws of Congress. This decision was taken to the United States Supreme Court by a writ of review and was passed upon by that Court in State vs. Rasmussen, 181 U. S., 198; 45 L. Ed. 820. The opinion of the Court was rendered by Justice Brewer, and closed with these words: "The

statute was an Act of the State of Idaho contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and provided for only such restraints upon the introduction of sheep from other states as in the judgment of the state was absolutely necessary to prevent the spread of disease. * * * * is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor. There being no other Federal question in the case, the judgment of the Supreme Court of Idaho is affirmed."

The Legislature of 1901 passed the Act set out in the record as "Exhibit B," page 18, and under its provisions the Governor issued the proclamation "Exhibit A," page 15, of the record, out of which grew the present action, which is only one chapter in a series of suits, during the last few years, in which the State of Idaho, has sought to protect its flocks from being destroyed by the disease-ladened sheep brought into the State each year from the desert of Utah. We desire in this connection to invite the Court to glance at the various statutes of the State of Idaho upon this subject, as evidence of the great care and good faith which the State of Idaho has exhibited in its attempts to keep its herds and flocks free from disease; and in contrast we invite the attention of the Court to the legislation of the State of Utah. It will be found that Utah is behind all other sheep-raising western states in the enactment of appropriate and effective laws to free its sheep from disease and to protect them from becoming diseased. The legislation on this question will be found in Section 63, Rev. Stats. of Utah as follows: "Every person owning, controlling

or ranging sheep in the State shall have all such sheep thoroughly dipped at least once a year, in some preparation that will kill scab, or shall be deemed guilty of a misdemeanor and upon conviction thereof may be fined in any sum not exceeding $100.00 for each offense."

No doubt the appellants in this case would insist there, as they did at the Idaho line, that their sheep were healthy and no dipping was necessary; or it may be possible also that it would be cheaper for each of the appellants to pay the small fine provided for of $100.00 than to dip the number of sheep owned by him.

An examination of the bulletins issued by the Government Bureau of Animal Industry will show that one dipping each year is of no practical benefit whatever in destroying this disease. Bulletin 21, page 14. That the disease can be cured by proper treatment, see Bulletin 21, pages 21 and 23.

As showing a comparison between the sheep of Idaho and those of the surrounding states in regard to disease we quote the following from the report of the State Sheep Inspector made to the Governor of Idaho on December 31, 1901, and the quotation is taken from the report of the Federal Inspector of the sheep shipped from the various states mentioned during the year 1901.

"The figures given in this report are supported by the report of the Federal Inspectors, which was obtained by them in their examination of sheep inspected to go into the markets or otherwise all interstate shipments made by rail, which our State Inspectors take no part. This report is as follows:

"Idaho shipped out 796,991 sheep, 15,335 condemned, being less than two per cent. scabby. Utah shipped 513,992 sheep, 64,269 condemned; Wyoming shipped 528,577 sheep, 34,430 condemned; Montana shipped 308,971 sheep, none condemned. It must also be remembered that two lots of these sheep condemned in Idaho was sheep brought into this state from Utah, in violation of the proclamation."

PECULIAR CHARACTER OF APPELLANT'S BILL AND BRIEF.

In view of the legislation enacted from time to time to eradicate the disease of scab among the sheep of Idaho and the indifferent legislation of the State of Utah upon the subject; and in view of the painstaking efforts of the Governor of Idaho, as disclosed in his proclamation, to ascertain the condition of the health of the quarantined sheep, we cannot withhold surprise at the impassioned, not to say discourteous, tone of appellants' bill and brief in this case. Every page of both the bill and brief bristles with italics and charges questioning the motives of the Idaho officials, and straining acknowledged principles of law to the breaking point.

In appellants' bill on page 6 of the transcript we are told that the Idaho officers "will prevent said sheep from grazing and pasturing or traveling over the said 'public domain" of the United States into the said State of Idaho, for the sole purpose of enabling said defendants, their associates, their agents and confederates to monopolize and exclusively use said range, and graze their own sheep and cattle upon said lands of the United States," and again on pages 9 and 10 of the transcript the bill in speaking of the

Governor's proclamation tells us that "the recital therein, etc., is wholly false and untrue in fact, and the said alleged information upon which said proclamation is based, if such has been given, is entirely false and groundless and given to said Governor solely for the purpose of enabling said defendants and their said associates and confederates to have and enjoy a monopoly of the grazing lands of the said "public domain" of the United States for themselves. * * * "That the said proclamation of the Governor of the State of Idaho is an arbitrary and unwarranted exercise of power and the alleged facts upon which it is claimed to be justified and based are wholly false." And on page 11 the bill continues in the same vein; " that said defendants threaten to, and will if not prohibited by this Court, confiscate and appropriate to their own use by force, the said sheep of the plaintiffs. That said defendants allege that they will use an army of citizens of the State of Idaho to force and drive said sheep out of the state into the State of Utah; and that they will with force take for their own use so many of said sheep so entering the State of Idaho as will fully compensate themselves and those so aiding them for their time and service without trial or any process of law whatever, of any of said sheep remaining alive after having been so driven back as aforesaid and abused by the defendants." On page 4 of appellant's brief the Court is asked: "Can the live stock growers of the State of Idaho, with the aid of willing State officials, secure for themselves a monopoly of the grass growing upon the public domain of the general government of that State?" And on page 7 the conspiracy of the State officials is again reiterated in the following language: "The complaint further alleges that the Appellees and their confederates and

their agents were so preventing the Appellants from driving their sheep into the State of Idaho in order to obtain for themselves and those associated with them the exclusive use of said public range in the State of Idaho and the grass growing upon the lands of the government of the United States therein."

On page 8 the Governor's proclamation is not only declared false, but it is insinuated that no information was received by him upon which the proclamation was based, as follows: "That the facts alleged, and which are claimed to exist and which are referred to in said proclamation as a reason for making said proclamation are false, are groundless, and were given to said Governor, if he has received the same, for the sole purpose of inducing him to assist the Appellees, their associates and confederates in obtaining for themselves a monopoly of the grazing lands on the public domain of the United States."

And bad faith is insinuated, if not asserted, by the following language on page 9: "The question presented then is as to whether an action of the Governor of the State of Idaho in making said proclamation is final and conclusive, and cannot be questioned irrespective of the motive or purpose behind it, or the gross wrong which is attempted, or may be attempted to be accomplished through the executive department of the State, however unwise or vicious it may be."

Even the Honorable Circuit Court comes within the purview of counsel for Appellants' caustic comments. On pages 12 and 13 of their brief, after placing their own interpretation upon the law, they continue: "Such being the law, it is difficult to under-

stand why the trial Court, in view of the facts alleged, should have had any doubt about the sufficiency of Appellants' complaint." And again on page 14: "It thus appears that said decisions were controlling in the judgment of the trial Court, and in effect determined that no matter what the wrong might be, so long as it masqueraded under the guise of the quarantine law of the State, it cannot be investigated." * * * "This conclusion is in direct opposition to every decision on the question, and no decision can be found to sustain any such a conclusion, but on the contrary the decisions above, including the decisions to which the lower Court referred, announces a contrary doctrine." And again on page 17: "How this case could have misled the lower Court, as it seems to have done, is hard to understand."

Returning to the discussion of the executive officers, on page 17, appellants' counsel informs us that "The appellants rely on the bad faith of the officers and the total absence of facts warranting any quarantine regulation." And on page 18 we are told of official indecency and of masquerading, and likened unto highwaymen in the following language: "If this be true, and it is not yet challenged, what could be more unjustifiable and manifest violation of Constitutional rights, to say nothing of official decency."

"The quarantine regulation in question can scarcely be said to be a pretense or masquerade, it is practically on a par with the action of a bold highwayman. The lower court certainly overlooked, or did not take this undenied allegation seriously." On page 23 of this extraordinary brief, the bold charge is made of a dishonorable alliance between the Gov-

ernor of Idaho and the railroads of the State to wrong the outside world. Referring to that portion of the Governor's proclamation on the matter of quarantine of sheep shipped into the State on railroads, we are told: "Its manifest purpose is to hold the good will of the railroad companies, and to prevent their joining in a contest against the State and its favored stockmen."

On page 26 of their brief some virtue is acknowledged in the Constitution and laws of Idaho but all virtue and intelligence are withheld from official sheep inspectors: "Even the Constitution and laws of Idaho confine the exercise of judicial functions to certain courts, not including sheep inspectors, many of whom can scarcely read the law or anything else. To know a scabby sheep when they see it is their only qualification."

Such sweeping denunciation of the officials of a State, particularly in the light of this Court's official knowledge to the contrary, carries with it its own condemnation.

ARGUMENT.

Happily the question of the constitutionality of the Act of the Legislature of Idaho providing for a quarantine against foreign diseased sheep is eliminated from this case by the decision of the Supreme Court of the United States in the case of Rasmussen vs. Idaho, 181 U. S. 198, 45 Law, Ed. 820.

In the above case this law and a proclamation of the Governor of Idaho, based upon it—a proclamation not only identical in all essential particulars with the proclamation involved in this case but promulgated and executed in the same manner—was held not to be

in contravention with either Sec. 8, Art. I., Sec. 2, Art. IV., or the Fourteenth Amendment of the Federal Constitution. A re-discussion therefore of either the law or proclamation in question here would be superfluous.

That every state is fully empowered to enact and execute reasonable quarantine laws against every other state has been so repeatedly adjudicated and so universally acknowledged as to need no discussion or citation of authorities; and no decision of Courts exist where a quarantine law has been declared unconstitutional except it appeared upon the face of the law or health regulations that it was manifestly unjust, unreasonable or in plain conflict with constitutional provisions or Federal laws which guard the interstate rights of citizens. The law of all of the decisions of Courts cited by Appellants in reference to quarantine laws, may, so far as this case is concerned, be admitted, as it has no bearing upon the real question at issue. Our admission, however, we respectfully submit, is limited to the law as plainly written by the Courts whose decisions are cited; and we must withhold endorsement of much of the peculiar interpretation given to the law by Appellants' counsel.

The question, and the only question, squarely presented here, is: Will this Court go back of the executive duty of the Governor of a state, involving an exercise of judgment and discretion, and inquire into the sufficiency or good faith of that officer, who has embodied in him the dignity and sovereignty of a sovereign state; and then perchance substitute the discretion and judgment of a high Federal authority.

We respectfully venture it as our candid judg-

ment that this Court will sustain the course of the Honorable Circuit Court of Idaho in declining to exercise so extraordinary a power by invading the sovereign prerogative of a Governor of a state of this Union.

We do not desire to be understood as claiming that the Governor of a State would not have an executive order, subversive of the Federal Constitution or laws, annulled by the courts the same as any unconstitutional law passed by a state would be so declared by the courts. Neither do we claim it inconceivable that a Governor might promulgate, under a valid law, a quarantine regulation which would be adjudged unconstitutional because manifestly too arbitrary, unjust, or unreasonable upon its face. What we do contend, however, is, that when the Governor of a State has a prescribed legal duty to perform and performs that duty, after an examination of the facts which in his judgement demand executive action under the law a Federal Court will not set on foot an investigation of the facts upon which the Governor acted or institute an investigation of the good faith of the head of a State into whose hands the executive sovereignty of the State is reposed. If our position is not correct then the Governors of the States are wholly subordinated to the Federal Courts in the exercise of their executive functions. If the Federal Courts can go beyond the constitution and law, beyond the language of executive proclamation and the facts of which courts take judicial knowledge, and inquire into the facts upon which the Governor acted after he has taken action; are we not right in asserting, that this would be practically requiring that the Governor first petition the Federal Court for permission to perform his executive duties?

We need not here elaborate upon the universal policy of courts to preserve at all times to the fullest extent the integrity of the co-ordinate branches of the government; nor need we advert to the reluctance of Federal Courts to assume to supervise the actions of state officers, and particularly Governors of States, in the performance of their duties prescribed by the laws, and will not do so unless upon well-settled ground for equitable interference.

In the vast number of reported decisions of courts there may be some authority extant upholding a court in entering into a contest of judgment with an executive acting within his province, but after diligent search we have been wholly unable to discover any such law, and, of a certainty, counsel for appellants have cited no such law.

High on Injunctions, Sec. 124, third Ed., clearly states the relationship of State and Federal authorities, viz.:

"From the peculiar form and structure of our system of government, each state being sovereign and independent within itself, except so far as its sovereignty may have been delegated to the general government, it follows that the chief executive officers of the different states are entirely independent of control by the Federal judiciary in the performance of their official duties, and these duties cannot be coerced by mandamus from the Federal courts. And while it is the plain and imperative duty of the Governor of any State, upon proper demand made by a Governor of any other State, to deliver up fugitives from justice from such other State, this duty being imposed upon him by the constitution and laws of the United States, yet the Federal courts are power-

less to compel the performance of this duty, and cannot grant a writ of mandamus in such a case, even though the act to be performed is purely ministerial. The performance of such duties is to be left to the fidelity of the executive of each State to the compact entered into with the other States when it became a member of the Union; and, if he refuses to perform so plain a duty, there is no power in the Federal government to coerce its performance."

If the Federal court lacks the power to compel a State executive to perform a legal duty, whence shall the court obtain power to prevent an executive from performing a legal duty?

The Governor of a State is not subject to injunction by courts in matters wherein he is acting in his official and discretionary capacity.

State, ex. rel. Taylor vs. Lord (Ore.) 31 L. R. A. 473. See pages 479 to 481.

"And while none of these facts would excuse the court from assuming jurisdiction, if its right to do so was clear, nor would the exposition given the constitution by the other departments be absolutely controlling upon it, when called upon, in the discharge of its duty, to construe that instrument, yet they afford a very persuasive argument why the court should not struggle to find some grounds, doubtful at best, upon which it can rest its jurisdiction. Before it could assume the power to question the legality of the actions of the other departments of the govern-

ment in such a case its right to do so ought to be beyond all possible question, and it ought to be able to place its jurisdiction upon some well settled ground for equitable interference."

Same case, p. 483.

The purpose of a statute must be determined by its natural and reasonable effect.

Henderson vs. New York, 92 U. S. 259.

Compagnie Francaise vs. State Board Health La. U.S. 46 Law Ed. 816, 817.

Court will not enjoin the President from performing an official duty.

Mississippi vs. Johnson, U. S. 18 Law, Ed. 437.

The Courts will not interfere with the executive officers of the Government in the exercise of their ordinary official duties.

United States vs. Raum, 34 Law Ed. 105.

What are the duties, powers and privileges of the government of Idaho?

In the language of the Constitution of the State, Art IV Sec. 5. "The supreme executive power of

the state is vested in the governor, who shall see that the laws are faithfully executed." Also Art. IV.

"Sec. 4. The Governor shall be commander-in-chief of the military forces of the State, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion."

He is also invested with the appointing and pardoning power, the power to convene the legislature in cases of emergency and to approve or veto bills submitted to him by the legislature.

The power of a court to control the governor is admirably discussed in Hartrauft's appeal 85 Pa. St. 433, 447. The court uses the language: "It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is vested in the governor, and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who, then, shall assume the power of the people and call this magistrate to an account of that which he has done in the discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the court of quarter sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the law and commander-in-chief of the militia of the common-wealth? For it certainly is a logical sequence that if the gov-

ernor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the court of quarter sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one can be compelled to answer, to account and to act. In other words, if, from such an analogy, we once begin to shift the executive power from him upon whom the constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better, at the outstart, recognize the fact that the executive department is a coordinate branch of the government, with power to judge what should or should not be done within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of those constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts."

The foregoing authorities fully sustain our contention of non-interference of the Federal Courts with the Governor of a State in the discharge of his official

duties, particularly in instances involving an exercise of judgment or discretion. The Honorable Circuit Court therefore with propriety declined to step within the province of the Chief Executive of Idaho and attempt to exercise the high prerogatives of that official. And the Court remained clearly within the rules of proper procedure in disregarding the allegations of Appellants' bill upon which they attempted to predicate an investigation into the grounds of the Governor's action. The utter recklessness of the charges, in itself, would be almost sufficient to provoke contempt. It is not a matter of especial surprise they should have been disregarded, as counsel complains, by the Honorable Court. However, even if the allegations were plead with more calmness and discussed with more dignity, the demurrer to the bill would have been properly sustained as complainants prayed for an order beyond the power of the Court to grant.

The executive being a co-ordinate branch of the State Government, and it being made his duty by law to investigate and decide when the conditions were sufficient to warrant him in issuing a quarantine proclamation, and it appearing that in the discharge of this duty he did investigate, and did find that the conditions were such as to require him to issue the proclamation; his decision will no more be investigated than would the decision of the Supreme Court of the state in a matter where it was pursuing its legal functions; the decision of the Governor upon such matter was as conclusive, and entitled to the same weight, faith and credit, as would be given to a decision of the highest Court of the state.

Suppose that Appellants had come into the Circuit Court complaining of a decision of the Supreme

Court of the state instead of the decision of the Governor, and had alleged that such decision was based upon false evidence, or upon no evidence at all; and that the Court in making such decision was in collusion with some one to injure citizens of the State of Utah, there being no Federal question involved, except this alleged wrong doing on the part of the Court, would the Circuit Court have assumed jurisdiction for the purpose of ascertaining if the State Court had acted honestly? Certainly not. Yet this is what Appellants have attempted to do, in regard to the discretionary acts of an equal branch of the State Government. It is sought in this way to raise a Federal question ; but we imagine the Courts will regard it as a sham, and refuse to take jurisdiction.

Was the exclusion of all sheep coming from the infected districts for the period of forty days, a reasonable quarantine regulation ?

This question, as the record will show, was raised in the case of Rasmussen vs. Idaho, 181 U. S., 198, and under the decision in that case, was decided in the affirmative.

Quarantine laws are intended to prevent the spread of disease, and it follows from the nature of contagious diseases that not only must animals bearing the visible marks of disease be barred, but animals coming from a locality where a disease is epidemic, and which are therefore likely to carry disease may be quarantined.

Health officers are justified in taking the greatest care for the prevention of disease.

Seavey vs. Preble, 64 Me. 120.

A civilized community should be satisfied with nothing less. All quarantine laws worthy of the name provide for the exclusion of persons, merchandise or animals coming from infected districts. This quarantine is nothing more than a quarantine against an infected district, which is clearly justifiable, under the decisions of all the Courts, on this subject.

In City of the St. Louis vs. Boffinger, 19 Mo. 13, the Court said :

"If the real design of the ordinance is a quarantine regulation to guard against the introduction of disease into the city, we will not undertake to determine whether some other measure interfering less with commerce could not as well have accomplished the object."

Whether a regulation of this kind is reasonable or not must depend largely on the nature of the disease to be prevented. In the Bulletin on Sheep Scab, issued by the Bureau of Animal Industry (No. 21, page 8), it is said :

"The losses from sheep scab have been and are still very severe in most sheep-raising countries. They are due to the shedding of the wool, the loss of condition and the death of the sheep.

"Although laws were made for the control of the disease as early as the beginning of the eleventh century, general ignorance in regard to its nature and proper treatment has prevented the successful administration of such laws even to the present day. The disease exists in most of the countries of Europe and also in Asia and Africa, and until recently in Australia. Most civilized countries now control the disease to a certain extent, and limit the losses by the

enforcement of stringent sanitary regulations; but the extent of its prevalence is nevertheless surprising. It is a disease not difficult to cure and eradicate and an accurate knowledge of its characteristics with attention to details are all that are needed to secure this result.

In the United States some sections have been overrun with sheep scab and many persons engaged in the sheep industry have been forced to forsake it because of their losses from this disease. It is probable that in its destruction of invested capital sheep scab is second only to hog cholera among our animal diseases. The large flocks of the plains and Rocky Mountain region and the feeding stations farther east have suffered severely and are constantly sending diseased sheep to the great stock yards of this country.

In addition to the direct losses in wool, in flesh and in the lives of our sheep, we have suffered immensely in our foreign trade because of the prevalence of this disease. Great Britain appears to have been the first country to prohibit live sheep coming from the United States by an order issued in 1879. Upon representations that there was no foot and mouth disease in the United States this order was rescinded in 1892, but only to be again enforced in 1896, on account of the many scabby sheep sent abroad by our exporters. Our sheep are consequently slaughtered on the docks where landed, the market being restricted and the prices much less favorable than would otherwise be obtained. The markets of continental Europe have been entirely closed to American sheep, as even the privilege of slaughtering

at the landing places is denied." (Page 8, Bulletin 21).

The increase in the number of the sheep and the consequent crowding of the ranges have made conditions worse than in 1898, when the Bulletin was issued.

Referring again to Bulletin 21 we find it stated at pages 13 and 14:

"All matters connected with the vitality of the scab mite have an important bearing in explaining cases of indirect infection on roads over which scabby sheep have been driven, or in fields and sheds where they have been kept. From the facts now at our disposal we can lay down the following important rules:

Scabby sheep should never be driven upon a public road; sheds in which scabby sheep have been kept should be thoroughly cleaned, disinfected and aired, and should be left unused for at least four weeks (better two months) before clean sheep are placed in them; fields in which scabby sheep have been kept should stand vacant at least four weeks (better six or eight) before being used for clean sheep; a drenching rain will frequently serve to disinfect a pasture but it is well to whitewash the posts against which scabby sheep have rubbed. Even after observing the precautions here given, it is not possible to absolutely guarantee that there will be no reinfection but the probabilities are against it."

After treating of the life of the parasite the Bulletin further says (page 14):

"Several practical lessons are to be drawn from these figures; first, it is seen that the parasites increase very rapidly, so that if scab is discovered in a

flock, the diseased sheep should be immediately isolated; second, if new sheep are placed in a flock, they should either first be dipped, as a precautionary measure or they should at least be kept separate for several weeks to see whether scab developes; third, since the chances of iufection are very great the entire flock should be treated even in case scab is found only in one or two animals; fourth, as dipping is not certain to kill the eggs, the sheep should be dipped a second time, the time being selected between the moment of hatching of eggs and the moment the next generation of eggs is laid."

As the sheep must necessarily be infected with mites in all stages of development even a second dipping will not entirely free the flock from disease, in fact, there is hardly any disease of domestic animals that requires more continuous and careful attention.

For a complete discussion of the nature of the disease we refer to the Bulletin. We also refer to the Rules and Regulations of the Bureau of Animal Industry. By rule 4 (page 33 Bulletin No. 9) a ninety-day quarantine is established for all diseased animals or those which have been exposed to disease.

In relation to sheep scab, we refer in addition to the Bulletin, to the following:

Report chief of Bureau of Animal Industry, 1899, pg. 247. Same report for 1900, pg. 216.

Administrative Work of the Federal Government in relation to the Animal Industry, 1899, pg. 452.

It is argued that the quarantine is unreasonable and bad faith may be imputed from the fact that the proclamation covered forty days in the spring of the year and at the time that sheep were being driven

from the infected districts. We submit that if the flocks of Idaho were to be protected from the disease of the infected districts it could be issued at no other time.

What benefit could accrue from issuing a quarantine proclamation after the flocks had been driven from the infected districts, into the State of Idaho, bearing their loads of disease with them and inoculating a large portion of the Idaho flocks? Sheep are not usually moved from place to place in winter time, and owing to climatic conditions they are not dipped during that season. Owners do not desire to dip ewes until after the birth of lambs. (Bulletin, pg. 19). Spring is therefore a period of great danger. The period of forty days was fixed in the proclamation so that the disease might have time to show itself, and make it possible to detect it. A perusal of the Bulletin cited will show that the presence of this disease is not easily detected, except after the wool begins to slip and sores to develop, which is not until a considerable time after the scab mite is lodged in the wool. This scab mite or parasite is practically microscopic and hides itself where the wool is most abundant, and may not develop so as to readily be detected until several weeks after.

Bulletin 21 on sheep scab, page 10, issued by Bureau of Animal Industry.

A study of these Bulletins will further show that this disease cannot be destroyed in ten days as claimed by Appellants' brief, and we respectfully suggest that no such holding was made by the Supreme Court of Idaho in the case of State vs. Duckworth, Supra. The Honorable Circuit Court, in the case at

bar, simply says that by two dippings ten days a part they could be so far cured as to render their passage through the country safe. This conclusion, however, the Government Bulletins will show is erroneous. But if it were true, that sheep scab can be cured by two dippings, ten day apart, after the disease is discovered, we fail to understand how that can be a basis for the claim, that ten days quarantine was sufficient. It should be noticed that the entire period covered by this proclamation is forty days, and that sheep are not required to wait forty days at the state line before entering the state. Several days would be consumed in reaching the state line after leaving the winter range in the infected district. That the sheep from these infected districts would not all reach the state line in a less period, than that covered by the proclamation, as not all would leave the desert at the same time. It was for this reason, that the period of forty days was no more than was necessary and reasonable.

EQUAL PRIVILEGES DENIED.

Under this head appellants contend that the railroad companies are given a special privilege for the reason that the proclamation prohibited sheep from being driven into the State for forty days, while it only required that those shipped into the State by railroad companies should be quarantined for fifteen days. It will be noticed by the proclamation that sheep imported into the State by railroad companies should be held and quarantined within two miles of the place where unloaded for a period of fifteen days; at the end of that time they should be inspected by the proper officer and if found free from disease should

be allowed to go their way, but if on an inspection they were found to be diseased they were to be held, and dipped as provided for in a general Act of the Legislature, approved March 6, 1901, until they were cured. Under the provisions of that law, which is found page 142, laws of 1901, said sheep could be held at the place where quarantined for a period of ninety days, if it was found necessary by the State Sheep Inspector or his deputy, in order to cure them of disease. The period of fifteen days provided for before inspection was deemed a sufficient period of time for the disease to develop so that it could be detected in case the sheep so shipped in were infected. This Court will easily understand the difference in the sheep being driven into the State and others being shipped in over the railroads. In the latter case all the sheep would arrive in the State at the same time and on the same train and could be taken in charge by the deputy inspector in the county where they were to be unloaded ; while in the case of those being driven in from the winter range, they would approach the State line at different times, some arriving one day, and others 10, 12, 15, 20 or more days thereafter. If the sheep being driven from this infected district had all reached the state line at the same time as they do when shipped in on the train, then a quarantine of fifteen days would have been sufficient perhaps to have developed the fact of their diseased condition, but as this could not in the nature of things happen, the investigation of the Governor showed that a period of forty days was the shortest time within which it could be safely expected that all of the sheep from this infected district would arrive at the state line. This was the purpose of the

difference in time, which was entirely reasonable, honest and necessary.

TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.

Under this heading Appellants complain that the State Sheep Inspector or his deputies are authorized by the law to seize sheep which are being driven into the State in violation of the Governor's Proclamation and to sell them for the purpose of paying the expense of driving the sheep from the State and the fines and costs provided for in the Act. The Appellants in their brief state: "The Inspectors are evidently authorized to enter judgment in their own minds or elsewhere as they please, fix the amount to be charged, and that becomes a judgment lien upon the sheep." An investigation of the law will show that the basis for this argument originated entirely in the imagination of the brief maker and has no foundation whatever in the law referred to. The bills and costs referred to in the Act are those provided for in Section 2 of the Act which shall be entered in the Court of Justice against those who are convicted of a violation of the law. The costs which are authorized to be paid in expelling the sheep, are the salaries of the Deputy Sheep Inspectors who are engaged, and are fixed at five dollars per day for each deputy. And an inspection of the law will show that all of these matters are fixed and provided for by law and not left to the whim or discretion of either the State Sheep Inspector or his deputies. For salaries of the Sheep Inspectors see Sec. 15, page 147, Laws 1901.

CONFLICTS WITH THE FEDERAL LAWS.

The record of the case of Rasmussen vs. Idaho, 181 U. S. 198, will show that this question was also discussed and submitted to the Court and that the Court by holding said law a valid quarantine law necessarily decided that it could be enforced and was proper notwithstanding there was some Federal legislation in regard to the inspection of livestock. An examination of these Acts of the National Congress will show that they principally apply to the shipment of livestock from one State to another. The first Act of Congress seems to have been in 1865 and amended in 1866, secs. 2493–5, R. S., U. S. No further legislation was had until 1884 when the Bureau of Animal Industry was established. This was followed by the Act of August 30, 1890, and March 3, 1891, and the Act of March 2, 1895. The legislation of Congress pertinent to the present inquiry is Sections 3, 6 and 7 of the Act of May 29, 1884.

Whether or not the rules and regulations which seem to have been promulgated by the Department in 1887, were ever certified to the authorities of the State of Idaho, or not, is not shown by the record, and we have been unable to learn. In any event, although the record is silent on the subject, there has been no acceptance of the regulations by the State and no co-operation between the State and National Governments. In fact, there is and has been no law of the State whereby the rules of the Department could be adopted or joint action taken. Is the State then barred from enacting the statute in question? We insist not. The Act did not purport to take from the States the power claimed, but on the contrary under the terms of Section three, there was a direct acknowl-

edgment of it. The Act sought to secure co-operation. There having been no acceptance by the State of the rules and regulations of the Department the remaining question is whether or not the enactment by Congress of Sections 6 and 7 is a bar to the State law. These sections in substance provided that it should be a misdemeanor to drive stock from one State to another knowing them to be affected with disease. These sections are in no sense a quarantine measure framed for the purpose of preventing the spread of disease.

We think the question is settled by the decision of the Supreme Court of the United States in the case of Missouri, K. & T. R. Co., vs. Haber, 169 U. S., 613, where the Act of Congress mentioned and a somewhat similar state statute were under consideration."

It is a settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an Act of Congress passed in the execution of a clear power under the constitution, unless the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or stand together.

Sinnot vs. Davenport, 22 How. 227.

"While under the provisions of the Act of Congress the state were invited to co-operate with the general government in the execution and enforcement of the Act, whatever power they had to protect their

domestic cattle against such diseases was left untouched and unimpaired by the Act of Congress."

Railroad Co. vs. Huson, 95 U. S. 465.

The Passenger Cases, 7 How. 283.

Patterson vs. Kentucky, 97 U. S. 501.

Gilman vs. Philadelphia, 3 Wall, 713.

Railroad Co. vs. Kentucky, 161 U. S. 699.

License Cases, 5 How. 576.

Gibbons vs. Ogden, 9 Wheat. 203.

This position is sustained by the later cases cited in appellants' brief from the Supreme Court of the United States.

Believing that no error was committed by the lower court in sustaining appellees' demurrer we ask that the decision be sustained.

FRANK MARTIN,
Attorney General,

E. J. DOCKERY, and

W. E. BORAH,
Attorneys for Appellees.

No. 840

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Washington, Northern Division.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX.

In the Superior Court of the State of Washington, for the County of King.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY, and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. —.

Complaint.

Comes now the plaintiff, G. W. Roberts, and for cause of action against the defendants Pacific & Arctic Railway and Navigation Company and British Columbia Yukon Railway Company, and each of them, alleges:

I.

That now and at all the times hereinafter mentioned the defendant Pacific & Arctic Railway and Navigation Company is and was a corporation organized under the laws of the State of West Virginia, and that now and at all the times hereinafter mentioned, the defendant British Columbia Yukon Railway Company is and was a corporation organized under the laws of the ——— of ———.

II.

That on the 16th day of December, 1898, said defendants were doing business in the Territory of Alaska and

the State of Washington, having offices and places of business in both the town of Skagway, Alaska, and the city of Seattle, Washington, and were at said times, and at all times since, have been conducting and carrying on their corporate business at both of the above-named places.

III.

That both of the defendant corporations were organized for the purpose, among others, of constructing, building, and operating a railroad from Skagway to the summit of White Pass, Alaska, and from thence to Lake Bennett in said Alaska, and when constructed to do a general business as a common carrier in the transportation of both freight and passengers over its said railroad from Skagway to said Summit, and from thence to said Lake Bennett.

IV.

That prior to the 16th day of December, 1898, the defendant corporations had commenced the construction of the railroad as aforesaid from said Skagway to the summit of White Pass, and from thence as aforesaid to Lake Bennett, and on said 16th day of December, 1898, the said railroad was under construction as aforesaid, and was on said last-named date largely completed from said town of Skagway to said summit of White Pass; that the prime object of the defendants in the construction of said railroad, was to transport thereover both passengers and freight bound and en route from said Skagway to Dawson City in the Northwest Territory, Dominion of Canada, and other points on the Yukon River in

Alaska, and said Northwest Territory, and the gold fields contiguous and near thereto, situate in said Territory of Alaska and the Northwest Territory, Dominion of Canada; and that said freight and passengers it was on said 16th day of December, 1898, intended to be transported over the said railroad by the defendants from Skagway to the summit of White Pass; and to enable said passengers and freight to reach and be transported to the gold fields and destination as aforesaid, that they be hauled and transported by wagons and sleds to be drawn by livestock from said summit of White Pass to Lake Bennett.

V.

That the defendants and plaintiff, fully understanding that such freight and passengers of necessity must be transported by sleds and wagons from the summit of White Pass to Lake Bennett as aforesaid, and as an inducement to passengers and owners of freight to be transported and go over the railroad then being constructed as aforesaid by the defendant companies, that proper and suitable provisions should be made and provided for transporting such freight and passengers from the summit of White Pass to Lake Bennett as aforesaid, and that it was of vital importance to defendants in the operation of said railroad when built, as an inducement to have passengers and owners of freight ship over the said railroad, that such provisions be made and facilities provided for the carrying of such freight and passengers from the temporary terminus of said railroad at the summit of White Pass to Lake Bennett, and said defendant

corporations fully realizing the importance of providing proper and suitable facilities for carrying such freight and passengers between White Pass and Lake Bennett, and desiring that proper and suitable facilities should be made and provided for such transportation, did, on the 16th day of December, 1898, at Seattle, Washington, make a proposition to plaintiff in writing, stating that they expected to haul from Skagway to the summit of White Pass about 4,000 tons of freight between January 15th and April 15th, 1899, and that they accepted the rate given theretofore by plaintiff to them of 4½ cents per pound from the summit of White Pass (International Boundary) to Lake Bennett; and further proposed to plaintiff to divide the freight with him and other parties in proportion to their carrying capacity, and further agreeing to allow plaintiff's sleds, harness and horses to be repaired at their blacksmith-shops along the trail, and asking for an acceptance of said proposition from the plaintiff.

VI.

That prior to the making by defendants to plaintiff of said proposition, a conversation was had between plaintiff and the agent and general traffic manager of defendant corporations covering the matters heretofore alleged, and during said conversation and as one of the important features covered thereby, plaintiff stated to said agent and general traffic manager, that he did not own at that time, horses, harness, sleds, etc., to do the freight business as aforesaid from the summit of White Pass to Lake Bennett, but that he (plaintiff) would pro-

vide himself with horses, harness, sleds, etc., to do freight business and haul freight from the summit of White Pass to Lake Bennett which was to be transported as aforesaid over the railroad from Skagway to the summit of White Pass; but that he would not so provide himself with horses, sleds, etc., unless the defendant corporations agreed to and would in good faith, furnish him with the freight so to be carried from the summit of White Pass to Lake Bennett, and that should he (plaintiff), provide himself with the proper facilities for carrying said freight as aforesaid, that he should expect and did expect, and defendants agreed with plaintiff that they (defendants) would, in good faith, furnish and provide him with freight as provided in said written proposal.

VII.

That said written proposition of defendants was received by plaintiff on the 16th day of December, 1898, and was by plaintiff on December 17th, 1898, at Seattle, Washington, in writing accepted by the plaintiff, and plaintiff agreed to provide himself with the proper facilities for doing said freight business as aforesaid.

VIII.

That after the 17th day of December, 1898, and relying upon the promise and agreement made by plaintiff with defendants as aforesaid, plaintiff purchased and procured twenty head of horses and harness for each thereof and the necessary sleds, tools, implements, appliances, etc., at a total cost to him of $7,000.00 and took the same to said summit of White Pass or near thereto to be

in readiness and to enable him to transport freight as aforesaid pursuant to the terms and provisions of said contract and agreement, all of which facts were at that time fully known to defendants.

IX.

That at the time of the making of the said contract, it was the expectation of both the plaintiff and the defendants that said railroad would be completed and ready for operation from Skagway to said summit by the 15th day of January, 1899; and plaintiff procured said horses, sleds, appliances, etc., and had same in readiness to do said freighting business as early as the 10th day of January, 1899, but plaintiff alleges that said railroad was not completed or ready for operation until the 17th day of February, 1899, and freight was not transported thereover from Skagway or any other point, to the summit, earlier than said last-named date; and plaintiff alleges that he was ready, willing and able, at the time of the completion as aforesaid of the railroad to the summit, and thereafter, and at all times between the 15th day of January, and the 15th day of April, 1899, to carry and transport such freight from the summit to Lake Bennett, upon the terms and as provided in said agreement; but plaintiff alleges that notwithstanding all the facts hereinbefore set forth and contained, defendants and each of them, intentionally and willfully broke and violated their said agreement with plaintiff, and did not, in good faith, carry out or undertake to carry out their said agreement, but on the contrary, willfully diverted from plaintiff, to other par-

ties, all of the freight seeking transportation and transported between said summit and Lake Bennett as aforesaid.

X.

Plaintiff further alleges that between the 17th day of February, 1899, and the 15th day of April, 1899, said railroad transported over its said line from Skagway to said summit, large and immense quantities of freight, to wit, 200 tons per day, and that had it furnished plaintiff with such freight which had to be carried from the summit to Lake Bennett, in proportion to his carrying capacity as compared with other parties, plaintiff could have and would have earned a gross amount of $220.00 per day for each team of two horses in the transportation and carrying of the same under the terms provided by the said contract; but plaintiff alleges as aforesaid, that notwithstanding it was in the power and control of the defendant companies to have so provided and furnished him with freight as aforesaid, said defendants discriminated against the plaintiff and diverted willfully and maliciously to other parties the whole of the said freight; and plaintiff alleges that during the whole of the time covered by the said contract, he was unable to utilize the said horses, sleds, etc., in any other business sufficient to pay the expenses of working said horses, sleds, etc., and shortly thereafter sold the same at a large sacrifice to plaintiff; that by reason of the facts hereinbefore recited and alleged, plaintiff suffered damages in the sum of $50,000.

Wherefore, plaintiff asks for damages against the

defendants and each of them, for the sum of $50,000, and for all costs and disbursements herein incurred.

BALLINGER, RONALD & BATTLE, and
J. D. JONES,

Attorneys for Plaintiff.

State of Washington, } ss.
County of King. }

G. W. Roberts, being first duly sworn, on oath says: that he is the plaintiff in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true.

G. W. ROBERTS.

Subscribed and sworn to before me this 8th day of May, 1900.

A. J. TENNANT,
Notary Public in and for the State of Washington, Residing at Seattle.

Filed August 18, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington, September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Superior Court of the State of Washington, for King County.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. ——

Petition for Removal on the Ground of Diverse Citizenship.

The petition of the Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company shows to the Court:

That the above suit was begun against them in the Superior Court of the State of Washington for King County on or about the 6th day of August, 1900.

That at the time said suit was begun and at the present time the plaintiff was and is a citizen and resident of the State of Washington, and the defendant, Pacific & Arctic Railway and Navigation Company, was and is a corporation duly formed and existing under and by virtue of the laws of West Virginia with its principal place of business at the city of Chicago, in the State of Illinois, the place where said corporation is domiciled, and the said defendant, British Columbia-Yukon Railway Company, was and is a corporation duly formed and exist-

In the Superior Court of the State of Washington, for the County of King.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

Bond on Removal.

Know all men by these presents, that we, the Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, as principals, and N. H. Latimer and E. B. Hussey, as sureties, are jointly and severally held and firmly bound unto G. W. Roberts in the penal sum of three hundred dollars ($300.00), for which amount, well and truly to be paid unto the said G. W. Roberts, his heirs, executors and administrators and assigns, we bind ourselves, our heirs, executors, administrators, successors and assigns, firmly by these presents. Sealed with our seals and executed this 20th day of August, 1900.

The condition of this obligation is such that if the said Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, in a suit now pending in the Superior Court of the State of Washington for the County of King, shall on the first day of the next session of the term of the Circuit Court of the United States for the District of Washington, Northern Division, enter a copy of the record on said suit and shall enter the appearance of the said Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company in said Circuit Court of the United States, and shall pay all costs that may be awarded against them by the said Circuit Court if said Court shall hold that said suit was wrongfully or improperly removed from said Superior Court, then this obligation to be void, but otherwise to remain in full force and effect.

In witness whereof, the said obligors have hereunto set their hands and seals this 20th day of August, 1900.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION CO., and
BRITISH COLUMBIA-YUKON RAILWAY CO.,

By JOHN P. HARTMAN,
Their Attorney.

N. H. LATIMER.
E. B. HUSSEY.

State of Washington, }
County of King. } ss.

On this 20th day of August, A. D. 1900, before me, personally came N. H. Latimer and E. B. Hussey, to me personally known and known to be the persons who executed the foregoing bond, and acknowledged that they executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal this 25th day of August, 1900.

[Notarial Seal] JOHN P. HARTMAN,
Notary Public in and for the State of Washington, Residing at Seattle.

We hereby acknowledge service of the foregoing and receipt of a true copy thereof this 24th day of August, 1900.

BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

Filed September 4, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Superior Court of the State of Washington, for King County.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 29,457.

Objection to Defendants' Petition to Remove.

Comes now the plaintiff in this action and objects to the granting of the petition of defendants filed herein, asking that this cause be removed to the Federal Court for the District of Washington, Northern Division, for the reason and upon the ground that said Circuit Court of the United States for the District of Washington is without jurisdiction to hear and determine this cause.

BALLINGER, RONALD & BATTLE,
J. D. JONES,
Attorney for Plaintiff.

Copy of within —— received and due service thereof acknowledged this 6th day of September, 1900.

JOHN P. HARTMAN,
Attorneys for Defendant.

Filed September 7, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Superior Court of the State of Washington, in and for the County of King.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.
No. 29,457.

Order of Removal from State Court.

This cause coming on to be heard upon the 8th day of September, 1900, upon the petition of defendants for removal of this cause to the United States Circuit Court for the District of Washington, Northern Division, and upon the objections of the plaintiff thereto to the removal of said cause, the said plaintiff being represented by his attorneys, Alfred Battle and J. D. Jones, and the said defendants being represented by their attorney, John P. Hartman, and after listening to the argument of counsel, and being fully advised in the premises, the cause was continued to this 10th day of September, 1900, and upon this day after due consideration, it is ordered—

1. That the bond and security offered by the said de-

fendants upon the removal of said cause be accepted, and said bond be and hereby is approved.

2. That this Court proceed no further in this cause.

3. That this cause be removed into the United States Circuit Court for the District of Washington, Northern Division, and the clerk is hereby directed to make proper transcript, and upon payment of his fees to transmit the same to the clerk of the United States Circuit Court for the District of Washington, Northern Division, at Seattle, Washington.

4. That the defendants be and hereby are permitted to amend their petition for removal, by inserting the words "was and," preceding the word "is," in the 9th line from the bottom of page one.

To the granting of said amendment, plaintiff objects.

To the granting of this order, plaintiff objects.

Done in open court this 10th day of September, 1900.

O. JACOBS,

Judge.

Filed September 10, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

Motion to Remand.

Comes now the plaintiff and moves this Court to remand the above-entitled cause to the Superior Court in and for King County, in the State of Washington, on the ground that this Court is without jurisdiction to hear and determine the case.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

Copy of within motion to remand received, and due service thereof acknowledged this 25th day of September, 1900.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Motion to Remand. Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

Opinion.

(Filed November 1, 1900.)

Action at law by a citizen of the State of Washington against two defendants, one being a corporation of the State of West Virginia, and the other an alien corporation. Heard on motion to remand. Motion denied.

BALLINGER, RONALD & BATTLE, for Plaintiff.
JOHN P. HARTMAN for Defendants.

HANFORD, District Judge.—The plaintiff has moved to remand this case to the State court, in which it was commenced, relying upon some of the newest text-books as authorities for so construing the act of Congress defining the jurisdiction of United States Circuit Courts (1 Supp. U. S. R. S., 2d ed., p. 611), as to exclude this case, for the reason that a citizen and an alien are joined as codefendants. It is asserted that the statute does not

confer upon United States Circuit Courts jurisdiction on the ground of diverse citizenship of the parties, where the controversy is between a citizen of a State on one side, and a citizen of a different State and an alien on the opposite side. (Black's Dillon on Removal of Causes, secs. 34, 68; L. Desty's Fed. Pro., 9th ed., p. 472; 18 Enc. Pl. & Pr., p. 238.) The only decisions of the Federal courts cited in support of the supposed rule are the following: King vs. Cornell, 106 U. S. 395-399; Merchants' Cotton Press Co. vs. N. A. Ins. Co., 151 U. S. 368-389; Field vs: Lamb, Fed. Cas. 4775; Ex parte Girard, Fed. Cas. 5457; Hervey vs. Illinois Midland Ry. Co., Fed. Cas. 6434; Sawyer vs. Switzerland Mar. Ins. Co., Fed. Cas. 12,408; Ward vs. Arredondo, Fed. Cas. 17,148; Dannmeyer vs. Coleman, 11 Fed. Rep. 97; Tracy vs. Morel, 88 Fed. Rep. 801.

In the case of King vs. Cornell, the Supreme Court decided that a suit by a citizen of New York, against several defendants, one of whom was an alien and the others citizens of the State of New York, was not removable, on the separate petition of the alien, and that the particular statute under which the right of removal was claimed in that case, had been repealed. Nothing else was decided and, in the opinion by Chief Justice Waite, there is not even a faint hint or suggestion of the idea that the mere joinder of nonresident citizens with aliens as defendants has the effect to deprive all the defendants of the right of removal, which they would have if sued separately. The other Supreme Court decision referred to is also entirely innocent of giving any aid or support to this fallacy. In Tracy vs. Morel, Judge Mun-

ger quoted with approval section 34 of Black's Dillon on Removal of Causes, and then repeats the author's error by saying that the same rule which he quoted from that text-book is stated in the case of King vs. Cornell. This opinion by Judge Munger comes nearer than any of the others in the above list to being an authority in point, but I do not consider it an authority, for the reason that the facts in the case did not warrant a decision of the question. The Court did not have jurisdiction of the case because the record failed to show that each of the defendants was entitled to litigate in the national forum, and it did show affirmatively that one of the defendants was a citizen of Nebraska, that being the State of which the plaintiff was a citizen and in which the suit was brought. For similar reasons, in each of the other cases cited, the Court did not have jurisdiction, and was not called upon to decide this question.

In the argument it has not been claimed that there is any reason for a rule denying to several defendants, when they are sued jointly, a privilege which the law gives to each of them, except that the case does not come within the letter of the law. It is said that:

"When a plaintiff, citizen of the State where the suit is brought, sues two defendants, one of whom is a citizen of another State, and the other an alien, * * * * the cause is not removable, because it does not come within any of the provisions of the statute. It is casus omissus. It cannot be said to be a controversy 'between citizens of different States,' because one of the parties is not a citizen; and it cannot be described as a controversy 'be-

tween citizens of a State and foreign citizens or subjects,' because one of the defendants is not a foreigner."

It is certainly true that the rule of strict construction must be applied to the acts of Congress defining the jurisdiction of courts, but it is possible to be too narrow and literal in construing these laws. See the opinion of the Supreme Court by Mr. Justice Gray in the case of Koenigsberger vs. Richmond Silver Mining Co., 158 U. S. 41-53. In that case the Supreme Court affirmed a decision of the United States Circuit Court for the District of South Dakota, maintaining its jurisdiction, on the ground of diverse citizenship, of a case which was pending in one of the Territorial Courts of Dakota Territory, at the time of the admission of South Dakota into the Union as a State. The Circuit Court of Appeals for the Ninth Circuit maintained the jurisdiction of this Court in a similar case, Blackburn vs. Wooding, 56 Fed. Rep. 545. All statutes, even those which impose penalties and declare forfeitures, must be given a sensible interpretation consonant with the intention and purpose of the legislature in enacting them. (United States vs. Kirby, 7 Wall. 482-487; Heydenfelt vs. Daney Gold and Silver Mining Co., 93 U. S. 634-641; United States vs. Stowell, 133 U. S. 1-20; Lan Ow Bew vs. United States, 147 U. S. 47-64.) The true rule applicable to this case was laid down by the Supreme Court in an opinion by Chief Justice Marshall, in the case of Strawbridge vs. Curtiss, 3 Cranch, 267, as follows: To bring a case in which there is more than one plaintiff or defendant, within the jurisdiction of a United States Circuit Court, on

the ground of diversity of citizenship of the parties, "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the Federal Court. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue or liable to be sued in those courts."

In Ex parte Girard, Fed. Cas. 5457, Mr. Justice Grier, in discussing the question in that case as to the right of removal, restated the rule enunciated by Marshall, and adapted it to removable causes in the following words: "Where there is more than one person, plaintiff or defendant, each must be competent to sue in the courts of the United States. The right to remove must exist in each and all the persons suing, and against whom the opposite party may demand a decree or judgment."

Within the letter and spirit of this rule, the right of the defendants to remove this cause into this court is clear.

The original petition for removal is criticised, because it did not allege that the alien defendant was a corporation organized and existing under the laws of the Dominion of Canada, at the time of the institution of this suit, but merely alleged that it was such corporation, and its citizenship was alleged to be that of a foreign corporation at the time of filing the petition. There was a hearing upon the petition by the Superior Court, and, upon leave granted by that Court, the petition was amended by inserting the necessary words to show that said defendant was an alien corporation at the time of the institution of the suit, to which amendment the plain-

tiff objected, and it is now contended that the amendment came too late, the time for filing a petition for removal having elapsed.

It is my opinion that the amendment was permissible, notwithstanding the plaintiff's objection thereto. If it had not been made before, and if it were deemed a necessary amendment, leave to make it would be granted by this Court now. My views on this subject are set forth in the case of Tremper vs. Schwabacher, 84 Fed. Rep. 415. See, also, 18 Enc. Pl. & Pr., 324, 325. But the amendment was unnecessary; the citizenship of a corporation is sufficiently disclosed by the allegation that it is a corporation duly organized under the laws of the State or country named. (Dodge vs. Tulleys, 144 U. S. 456.) The words of the petition refer to the creation of the corporation and determine its citizenship every moment of its existence, including the time of commencing this action against it. (Shaw vs. Quincy Mining Co., 145 U. S. 444-453.)

Motion to remand denied.

C. H. HANFORD,
Judge.

[Endorsed]: Opinion. Filed in the United States Circuit Court, District of Washington. November 1, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 876.

Order Denying Motion to Remand.

Heretofore there came on duly and regularly for hearing the motion and application of the plaintiff to remand this cause to the Superior Court of the State of Washington, for the County of King, for the reasons set forth and contained in said motion, Messrs. Ballinger, Ronald & Battle appearing for the plaintiff, and John P. Hartman, Esq., appearing for the defendants, and after hearing the arguments of counsel and duly considering said motion, it is hereby ordered and adjudged that said motion be and the same is hereby in all things overruled and denied; to which order, judgment and decison of the Court plaintiff excepts, and his exception is hereby allowed.

Dated this 7th day of November, 1900.

C. H. HANFORD,
Judge.

X.

That the defendants deny each and every of the allegations contained in the tenth paragraph of said complaint.

Wherefore the said defendants pray that they may be dismissed hence, and recover their costs against the said plaintiff.

JOHN P. HARTMAN,
Attorney for Defendants.

State of Washington, }
County of King. } ss.

E. C. Hawkins, being first duly sworn, upon oath says; that he is the general manager of the above-named defendants; that he has read the foregoing answer and knows the contents thereof, and that the facts and allegations therein contained are true, as he verily believes.

E. C. HAWKINS.

Subscribed and sworn to before me this 20th day of November, 1900.

JOHN P. HARTMAN,
Notary Public in and for the State of Washington, Residing at Seattle.

We hereby acknowledge service of the foregoing, and the receipt of a true copy thereof this 21st day of November, 1900.

BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

[Endorsed]: Answer. Filed in the United States Circuit Court, District of Washington. November 22, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,

Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,

Defendants.

No. 876.

Notice of Motion for New Trial.

To the Defendants Above Named, and Each of Them, and to John P. Hartman, Their Attorney:

Please take notice that the plaintiff in the above-entitled action intends to move the above-entitled court to set aside the verdict rendered in this cause in favor of the defendants and against the plaintiff on the 3d day of July, 1901, and for a new trial in the above-entitled action upon the following grounds:

I.

That said verdict is contrary to the law and to the evidence, and is without either law or evidence to support the same.

II.

Error in law occurring at the trial and excepted to at the time by the plaintiff.

And you will further take notice that said motion to be made is hereto attached, and is filed and served herewith.

Dated this 3d day of July, 1901.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 876.

Motion for New Trial.

Comes now the plaintiff in the above-entitled action and moves the above-entitled court to set aside the judgment rendered herein in favor of the defendants and against the plaintiff on the 3d day of July, 1901, and for a new trial in the above-entitled action for the following reasons:

I.

That said verdict is contrary to the law and to the evidence, and is without either law or evidence to support the same.

II.

Error in law occurring at the trial and excepted to at the time by the plaintiff.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

[Endorsed]: Notice of Motion for New Trial and Motion for New Trial. Filed in the United States Circuit Court, District of Washington. July 3, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY et al.,
Defendants.
No. 876.

Order Denying Motion for New Trial.

This cause coming on this day to be heard upon the plaintiff's motion for a new trial, the plaintiff being represented by his attorneys Ballinger, Ronald & Battle and J. D. Jones, and the defendants being represented

by their attorney, John P. Hartman, and the cause being argued by the respective counsel for the parties, and the Court taking the same into consideration:

It is ordered, considered, and adjudged that the plaintiff's motion for a new trial be, and the same hereby is, denied, to which ruling and order the said plaintiff excepts and an exception is allowed.

Done in open court this 29th day of October, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Order Denying Motion for New Trial. Filed in the United States Circuit Court, District of Washington. October 29, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 876.

Judgment.

This cause coming on this day to be heard upon the oral motion of the defendants for judgment against the

plaintiff, the said plaintiff being represented by his attorneys, Ballinger, Ronald & Battle and J. D. Jones, and the said defendants being represented by their attorney, John P. Hartman, the Court having heretofore denied the motion for a new trial, and the Court being fully advised in the premises, and no reason being given why judgment should not be entered against the said plaintiff and in favor of the said defendants;

It is therefore considered, adjudged and decreed by the Court that the said defendants be dismissed hence without day, and that they recover of and from the said plaintiff their costs, to be taxed by the clerk, and that execution shall issue for the recovery of the judgment award.

To the entry of this judgment and decree the said plaintiff excepts and an exception is allowed.

Done in open court this 30th day of October, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Judgment. Filed in the United States Circuit Court, District of Washington. October 30, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY et al.,
Defendants.
No. 876.

Stipulation for Extension of Time to File Bill of Exceptions.

It is hereby stipulated and agreed by and between the parties to this action that the time of the plaintiff within which to prepare and file and serve a bill of exception or exceptions in the above-entitled cause may be extended to and including the 23d day of November, 1901.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.
JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Stipulation. Filed in the United States Circuit Court, District of Washington. November 9, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY et al.,
Defendants.
No. 876.

Order Extending Time to File Bill of Exceptions.

Now, on this 9th day of November, 1901, plaintiff appeared by his attorneys and moved the Court orally for an extension of time within which plaintiff may prepare, file and serve his bill of exception or exceptions herein, to and including the 23d day of November, 1901, and presented to the Court a stipulation of parties consenting to said extension

Wherefore, it is by the Court ordered and considered that the time within which plaintiff may prepare, file and serve his bill of exception or exceptions herein is enlarged and extended to and including the 23d day of November, 1901, said date being within the June, 1901, term of this court.

Done in open court this 9th day of November, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Order Extending Time. Filed in the United States Circuit Court, District of Washington. November 9, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.
No. 876.

Bill of Exceptions.

Be it remembered that this cause came on duly and regularly for trial on the 25th day of June, 1901, before Honorable C. H. Hanford, Judge of the above-entitled court, plaintiff appearing by his attorneys, Ballinger, Ronald & Battle and J. D. Jones, and the defendants appearing by their attorney, John P. Hartman. A jury being impaneled and sworn to try the case, the following proceedings were had and the following exceptions duly taken:

Exception I.

To sustain the issues on behalf of the plaintiff, G. W. ROBERTS the plaintiff was called and gave testimony, as did other witnesses, tending to show that L. H. Gray was at all the times mentioned in plaintiff's complaint, and hereinafter mentioned, the general traffic manager of both of the defendant companies, and had and maintained his office as such traffic manager in the city of

Seattle, Washington, that prior to the writing of the letters hereinafter set forth, said Roberts visited said traffic manager at his office in said city of Seattle concerning the making of contract with the said defendants for the hauling of freight; that when he, plaintiff, went into the office of the defendant companies at Seattle, Washington, to talk with the said L. H. Gray, General Traffic Manager, about hauling freight from the summit of White Pass to Lake Bennett, said Gray informed him that the defendant companies were going to have a great quantity of freight to be carried over, and that the freighters and packers up there were asking ten cents a pound to haul freight from the summit of White Pass to Lake Bennett, and was there told by the said Gray that he, plaintiff, was just the man said Gray wanted to talk with, and after learning that plaintiff was acquainted with that country, desired to know if plaintiff wanted a contract to haul freight up there, to which plaintiff replied that he did; whereupon said Gray asked plaintiff what the same could be hauled for, and further informed plaintiff in said conversation that the Dyea Tramway Company was hauling freight to Lake Bennett for seven (7) cents a pound, and wanted to know if plaintiff would take a contract to haul freight at such a rate from said summit to Lake Bennett as would enable the defendants to compete with said Dyea Tramway Company, whereupon the plaintiff asked said Gray what the defendant companies charged for transporting freight from Skagway to said summit, to which the said Gray replied, two cents a pound; and further stated to plaintiff that if he, plaintiff, could transport it from said summit to Bennett

at a figure by which the defendants could compete with said Dyea Company, the said defendants would give plaintiff a contract to haul freight, whereupon plaintiff stated that he, plaintiff, would haul said freight from the said summit of White Pass to said Lake Bennett for four and one-half cents a pound; thereupon said Gray asked plaintiff if he would put said proposition in writing, to which plaintiff replied in the affirmative, whereupon said Gray stated to plaintiff: "Well, you do that, and make me this proposition in writing." Further in said conversation said Gray asked the plaintiff if he, plaintiff, had teams up there (meaning at said summit) all ready to haul freight, and was informed by plaintiff that he did not at said time, but that he, plaintiff, could and would procure an outfit of teams sufficient to handle any amount of freight that said defendants might give plaintiff to haul; that said Gray also then and there stated to plaintiff that the defendants would have thousands of tons to haul from the summit to Lake Bennett, and that the defendants did not wish to be bothered about the scarcity of teams, and insisted on the said plaintiff procuring his outfit and being ready to receive and haul said goods and freight by a date then and there designated by the said Gray; that thereupon plaintiff, in compliance with the request of said Gray, embodied said proposition in writing, which said writing was introduced in evidence and marked Plaintiff's Exhibit "A," and is as follows:

Plaintiff's Exhibit "A."

Seattle, Wash., Dec. 14, 1898.

Pacific & Arctic Railway and Navigation Co., British Columbia-Yukon Railway Co., Dexter Horton Bldg., Seattle, Wash.

Gentlemen: In keeping with my conversation of yesterday with your general traffic manager, Mr. L. H. Gray, in reference to freighting goods for you from the White Pass, or summit of the mountain, to Lake Bennett in the Northwest Territory, I wish to say that if you will guarantee to furnish me at least one hundred tons per month commencing Jan. 15, 1899, and extending to about April 15, 1899, or until the roads break up in the spring, and pay me therefor at the rate of four and one-half cents per pound on delivery of goods at Lake Bennett, and haul my feed and supplies from Skagway to the summit of the mountains for one and one-half cents per pound, and give me a free pass over your road during the time of said work, I will agree to put on sufficient teams to handle, with expedition, the amount above stated or more, when we find that there will be more for me to haul, you, of course, giving me sufficient notice to procure the extra teams, and will endeavor to work to your interest in the handling of said freight and protect you from any combination that might be formed for the purpose of advancing rates; any piece of machinery or other freight weighing more than five hundred pounds, to be paid for

extra, as may be agreed upon hereafter. An early reply will greatly oblige,

Yours truly,

G. W. ROBERTS,

Room 622, New York Block, Seattle.

Which proposition or letter the said Gray duly received, and in reply thereto the said Gray, as such general traffic manager, delivered to plaintiff a certain paper writing offered in evidence and marked Plaintiff's Exhibit "B," which is as follows:

Plaintiff's Exhibit "B."

Seattle, Wash., December 16th, 1898.

File No. 74, G. W. Roberts, shipments.

Mr. G. W. Roberts, Room No. 622 N. Y. Bldg., City.

Dear Sir: Referring to your favor of December 14th, 1898, my file No. 74, will say that we expect to haul from Skaguay to the summit of White Pass about 4,000 tons of freight, between January 15th and April 15th. We accept your rate of 4½ cts. per lb. from Summit of White Pass (International Boundary) to Lake Bennett, but we cannot agree to give you any special amount in a specified time, as the elements are beyond our control, and there is a possibility of the steamers being delayed in reaching Skaguay. We do agree however to treat you fairly by dividing the freight with you and other parties in proportion to their carrying capacity. You can depend upon the White Pass & Yukon Route acting fairly and squarely with you; and, it is my opinion that you will be offered at least 25 or 30 tons of freight per day.

We will agree to allow your sleds and harness repaired and horses shod at our blacksmith shops along the trail, at actual cost.

I consider the above a fair proposition and await your acceptance.

Yours truly,

L. H. GRAY,
G. T. M.

LHG—M.

Thereafter, and on the same day, plaintiff, in reply thereto, delivered to the said Gray, as such traffic manager, certain other paper writing admitted in evidence and marked Plaintiff's Exhibit "C," which is as follows:

Plaintiff's Exhibit "C."

Seattle, Wash., Dec. 17th, 1898.

White Pass & Yukon Route, L. H. Gray, G. T. M., Seattle, Wash.

Dear Sir: Referring to your favor of Dec. 16th in reference to carrying your freight from the summit of White Pass to Lake Bennett, I have considered your proposal to give me a rate of 4-½ cts. per lb. and hereby accept the same.

Very truly yours,

G. W. ROBERTS.

And further to sustain the allegations of plaintiff's complaint, plaintiff and other witnesses gave testimony tending to prove that plaintiff, in order to comply with and in reliance upon the propositions and answers and acceptances marked "A," "B," and "C" and above copied, equipped himself with horses, sleds, harness, feed, and

outfit for the purpose of taking the same to the summit of White Pass, Alaska, for the purpose of using the same in the fulfillment and carrying out the contract of hauling said freight from the summit of White Pass to Lake Bennett, and that said equipment was completed and taken by the said Roberts to the said point in Alaska within the time required by said paper writings, and upon his arrival at Skagway with the same, notified and informed the said Gray, who then was at said Skagway, that the plaintiff was in readiness with his horses, harness, sleds, outfit, etc., to haul freight from the summit to Lake Bennett, as per the terms of said paper writings, and demanded that freight be delivered by said defendants to the plaintiff to be hauled as aforesaid, as per the terms of said paper writings. And against the evidence in behalf of the plaintiff the defendants introduced and the Court admitted evidence tending to prove the contrary.

It was further stipulated upon the trial of this action that at least 2,200 tons of commercial freight was transported from Skagway to said summit to be thence transported or hauled by sled, teams, etc., from the summit to Lake Bennett. And it was further shown in the testimony that the said defendants did not furnish nor deliver to this plaintiff any freight whatsoever, and that plaintiff was not permitted to haul any of said freight, although demand was made therefor by plaintiff.

Further, plaintiff having rested his case, the defendant called to testify as a witness on behalf of defendants the said L. H. GRAY, who, over the objection of plaintiff on the ground that the same was irrelevant, immaterial and

incompetent, and had the effect of tending to prove the rescission or modification of the contract as claimed by plaintiff without the same having been pleaded by the defendant, gave testimony in substance as follows:

After Mr. Roberts arrived in Alaska with his teams, outfit, etc., I notified him personally that we could not give him any freight on account of the high rates he wanted from the summit to Lake Bennett, and I notified him and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett; whereupon the plaintiff Roberts stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told him the freight must be hauled for in order that we could compete with the Dyea trail; that after the said Roberts arrived in Alaska with his horses, teams, outfit, etc., that he, the plaintiff Roberts, signed a document received in evidence and marked Defendants' Exhibit No. 2, which is as follows:

Defendants' Exhibit No. 2.

Skaguay, Alaska, February 15th, 1899.

Mr. L. H. Gray, G. T. M., W. P. & Y. R., Seattle, Washington.

Dear Sir: We, the undersigned, hereby agree to protect the following freighters' rates during good sledding:

Between Heney and Summit .....1c. per pound.
Between Summit and Log Cabin .....1c. per pound.
Between Summit and Lake Bennett ..2c. per pound.
Between Log Cabin and Lake Bennett .1c. per pound.

If absolutely necessary to protect Dyea competition and Packers' rates from Skaguay, we will confer with you and arrange some satisfactory basis of rates.

Yours truly,

G. W. ROBERTS.

And that thereafter the said Gray notified plaintiff that he must make a still lower cut in the freight rate from the summit to Lake Bennett, and that the plaintiff stated that he did not want freight upon those rates, to the admission of all of which said testimony and of said paper writing marked Defendants' Exhibit No. 2, the plaintiff then and there in writing duly excepted, which exception was allowed by the Court.

Exception II.

After this case was set for trial for June 25, 1901, defendants made application to the Court for a continuance thereof, on the ground that one A. J. Powell was a material witness on behalf of the defense and it was impossible to procure the attendance of the said A. J. Powell to testify on said trial on said June 25th, which said applicaton for continuance was supported by an affidavit of John P. Hartman, the defendants' attorney, to the effect that the said A. J. Powell, if personally present at said trial, would testify that the plaintiff did not at the time of making the alleged contract as set forth in plaintiff's complaint, or at any time thereafter, have any pack horses or other animals at Skagway, Alaska, or elsewhere that he could use for the purpose of packing, drawing or hauling goods, wares or mer-

chandise as alleged by plaintiff in his complaint; that the plaintiff was not at that time or thereafter possessed of any facilities, appliances, teams, machinery or otherwise, for packing, drawing or hauling goods from White Pass to Bennett, or anywhere else, and that the plaintiff was without funds or credit of any kind or character whatsoever with which to procure teams, horses, or appliances for the purpose of transporting goods as alleged he would have done, as set forth by plaintiff in his complaint; and that the relations existing between plaintiff and said Powell were intimate and close, and that said Powell was fully acquainted with the financial condition of plaintiff, and was during all the time between January 1, 1899, and for the four months following thereafter, in almost daily contact with plaintiff, and knew his condition and ability to respond on any contract which he might make. That upon the hearing of said application the Court decided that said motion of defendants for continuance would be granted upon terms unless plaintiff should agree and admit that if the said Powell were present he would testify as set forth in said affidavit; whereupon, and for the purpose of avoiding a continuance, plaintiff admitted that if the said Powell were present and testifying in this cause, he would testify as set forth in said affidavit. Further, as a part of the evidence for the defense, said admission was introduced in evidence by the defendants.

In rebuttal, and for the purpose of showing that said Powell had at another time made a contrary state

ment, plaintiff called the witness R. M. HESTER, whereupon the following questions were propounded by counsel for plaintiff to said witness:

Q. You are acquainted with one A. J. Powell?

A. I am.

Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken up to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between him and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett.

To which question counsel for defendants interposed the following objections:

"I object, for the reason that any statements of this witness unless made in our presence, would be improper and not rebuttal testimony."

Which objection the Court thereupon sustained, to the sustaining of which plaintiff then and there in writing duly excepted, which exception was allowed by the Court.

And upon the trial, after all the evidence had been introduced and counsel for both parties had concluded their arguments and submitted the case, the Court instructed the jury as to the law and among other instructions gave the following:

"If you find from a preponderance of the evidence that a contract was made and entered into as claimed by plaintiff, and that plaintiff, either in person or through anyone else, procured the necessary teams, harness,

sleds, etc., for the purpose of fulfilling said contract, and placed himself in readiness to perform the same and intended performance thereof, then and in that event you are instructed that this constituted a complete contract and that the defendants under the issues of this case cannot claim, and you cannot consider, any modification, if any, of said contract."

And after the jury had retired, Mr. Hartman, attorney for the defendants, informed the Court that he wished to take an exception to said instruction, and thereupon instead of allowing the exception the Court recalled the jury and gave additional instructions as follows:

"Gentlemen of the jury, it has been supposed that one of our instructions may have been misleading. That was the instruction I gave you that if the jury find that a contract was made that you are not required to consider at all the question of any subsequent modification or change in the terms of the contract. Now, I have no intention to withdraw that instruction. I leave it as I gave it to you, but, lest there should be any misapprehension in your mind I want to tell you that I had no intention of instructing you under any circumstances to disregard the exhibit introduced in the case, a writing signed by Mr. Roberts, signed at Skagway, with reference to the rate of hauling freight. I leave that as a scrap of evidence in the case which you should consider along with all the other testimony in the case, as bearing on the whole question of whether there was a contract made and entered into with definite terms. My instruction that you are not to consider any modifi-

cation of the agreement, if any was ever made and consummated, does not carry with it as a consequence that you are to reject that as evidence."

Now, in furtherance of justice and that right may be done, plaintiff presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed, signed and certified by the judge, as provided by law.

BALLINGER, RONALD & BATTLE, and
J. D. JONES,
Attorneys for Plaintiff.

The foregoing bill of exceptions is correct and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court at the June term, 1901, and dated this 2d day of December, 1901.

C. H. HANFORD,
Judge.

Copy of within bill of exceptions received, and due service thereof acknowledged this 21st day of November, 1901.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Bill of Exceptions. Filed in the United States Circuit Court, District of Washington. November 21, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

Settled and refiled in the United States Circuit Court, District of Washington, December 2, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. 876.

Petition for Order Allowing Writ of Error.

The plaintiff herein, G. W. Roberts, feeling himself aggrieved by the verdict of the jury and the judgment rendered on the 30th day of October, 1901, pursuant to said verdict, whereby it was considered and adjudged that the defendants be dismissed hence without delay, and that they recover of and from said plaintiff their costs to be taxed by the clerk, and that execution shall issue for the recovery of the judgment award, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of said plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition and in the bill of exceptions filed in this cause, comes now by Ballinger, Ronald & Battle and J. D. Jones,

his attorneys, and pray said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and the transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the United States Circuit Court of Appeals. And your petitioner will ever pray.

Dated this 18th day of April, 1902.

BALLLINGER, RONALD & BATTLE, and
J. D. JONES,

Attorneys for Plaintiff.

Copy of the foregoing petition received and due service thereof acknowledged this 18th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Petition for Order Allowing Writ of Error. Filed in the United States Circuit Court, District of Washington. April 18, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.
No. 876.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the courtroom of said court in the city of Spokane, on the petition of the plaintiff G. W. Roberts, praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed within due time;

And also praying that a transcript of the record and proceedings and papers upon which a judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises:

Now, therefore, it is ordered that the appeal bond herein be and the same is hereby fixed at the sum of two hundred and fifty dollars, conditioned and to the effect

that the said plaintiff, shall prosecute his writ of error to effect and shall answer all damages and costs that may be awarded against him if he fail to make his plea and appeal good. Said bond and security to be approved by the above-entitled Court or Judge presiding therein.

Done in open court this 17th day of April, A. D. 1902.

C. H. HANFORD,

District Judge, and one of the Judges of the said United States Circuit Court Presiding Therein.

[Endorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the United States Circuit Court, District of Washington, April 18, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. 876.

Assignment of Errors.

Comes now the above-named plaintiff, G. W. Roberts, by Ballinger, Ronald & Battle and J. D. Jones, his at-

torneys, and in connection with their petition for writ of error herein, make the following assignment of errors, and particularly specify the following errors upon which he will rely, and which he will urge upon the prosecution of said writ of error in the above-entitled cause, and which he avers occurred on the trial of the cause, to wit:

I.

That the United States Circuit Court, in and for the District of Washington, Northern Division, erred in overruling the motion filed in this cause in this court by plaintiff to remand this case to the Superior Court of King County, Washington, in which said cause was instituted, and in making, rendering, and entering the judgment herein overruling and denying said motion.

II.

The Court further erred in admitting, over the objection of the plaintiff, the testimony of L. H. Gray, a witness for the defendants, the full substance of which testimony is as follows:

That after the plaintiff arrived in Alaska with his horses, sleds, outfit, etc., I, L. H. Gray, notified him personally that we (meaning the defendant companies) could not give him any freight on account of the high rates he wanted for hauling the same from the summit of White Pass to Lake Bennett, and I notified him, the plaintiff, and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett; whereupon the plaintiff stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told

him the freight must be hauled for in order that we could compete with the Dyea trail.

And in receiving in evidence Defendant's Exhibit No. 2 referred to and set forth in the bill of exceptions; and in permitting said witness to testify that he notified plaintiff that he must make still lower cut in the freight rates from the summit to Lake Bennett, and that plaintiff then stated that he did not want freight upon those rates.

III.

Error of the Court in sustaining the objections of the defendants to the following questions propounded by the attorney for the plaintiff to the witness R. M. Hester:

Q. Are you acquainted with one A. J. Powell?

A. I am.

Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken up to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between himself and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett?

To which questions counsel for defendants interposed the following objections:

"I object, for the reason that any statements of this witness, unless made in our presence, would be improper and not rebuttal testimony." Which objection the lower court sustained.

BALLINGER, RONALD & BATTLE, and
J. D. JONES,
Attorneys for Plaintiff.

Copy of the foregoing assignment of errors received and due service thereof acknowledged this 18th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Assignment of Errors. Filed in the United States Circuit Court, District of Washington, April 18, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.
No. 876.

Bond on Writ of Error.

Know all men by these presents, that G. W. Roberts, plaintiff in the above-entitled action, as principal, and J. W. Foust and C. D. Patterson, as sureties, are held and firmly bound unto the Pacific & Arctic Railway and Navigation Company, and British Columbia-Yukon Railway

Company, and each of them, in the full and just sum of two hundred and fifty and no|100 dollars, to be paid to the said defendants, their attorneys, successors or assigns, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors, or assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 24th day of April, 1902.

The condition of the above obligation is such that whereas, lately at a session of the United States Circuit Court of the United States, for the District of Washington, Northern Division, in a suit pending in said court between the said G. W. Roberts as plaintiff, and the Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, corporations, as defendants, final judgment was rendered against said plaintiff adjudging that defendants be dismissed hence without delay, and that they recover of and from plaintiff their costs to be taxed by the clerk, and that execution issue for the recovery of the judgment award; and

Whereas, said plaintiff has obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants in the aforesaid suit is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California:

Now, therefore, if the said G. W. Roberts shall prosecute his writ of error to effect, and shall answer all damages and costs that may be awarded against him if he

fails to make his plea good, then this obligation is to be void; otherwise to remain in full force and effect.

G. W. ROBERTS,
Principal.

J. N. FOUST,
C. D. PATTERSON,
Sureties.

Signed, sealed and delivered in the presence of:

A. J. TENNANT.
D. I. WASHBURN.

United States of America,
District of Washington. } ss.

J. N. Foust and C. D. Patterson, being first duly sworn, on oath each for himself deposes and says that he is one of the sureties named in the foregoing bond; that he is worth the sum of five hundred ($500) dollars over and above all his just debts and liabilities, and property exempt from execution, situated in the State of Washington. That he is neither an attorney nor counselor at law, sheriff, or clerk of the Superior or other court.

J. N. FOUST.
C. D. PATTERSON.

Subscribed and sworn to before me this 24th day of April, 1902.

[Notarial Seal] A. J. TENNANT,
Notary Public in and for the State of Washington, Residing at Seattle.

Approved this 25th day of April, 1902.

C. H. HANFORD,
Judge.

[Endorsed]: Bond on Writ of Error. Filed in the United States Circuit Court, District of Washington, April 26, 1902. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the United States Circuit Court, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. 876.

Acceptance of Service of Writ of Error.

I, the undersigned, attorney for defendants in error above named, hereby admit having received and served with a copy of the writ of error in this cause, this 28th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Pacific & Arctic Railway and Navigation Company, and British Columbia-Yukon Railway Company.

[Endorsed]: Acceptance of Service of Writ of Error. Filed in the United States Circuit Court, District of Washington, May 3, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
(Plaintiff in Error),

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.
(Defendants in Error).

No. 876.

Clerk's Certificate to Transcript.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States, for the District of Washington, do hereby certify the foregoing forty-eight (48) typewritten pages, numbered from one to forty-eight, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of

record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is the sum of $14.75, and that the same has been paid to me by Ballinger, Ronald & Battle, attorneys for plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court this 15th day of May, 1902.

[Seal] A. REEVES AYRES,

Clerk United States Circuit Court, District of Washington.

By R. M. Hopkins,

Deputy Clerk of said Court.

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. —.

Writ of Error.

United States of America, } ss.
Ninth Circuit.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between G. W. Roberts, plaintiff and plaintiff in error, and Pacific & Arctic Railway and Navigation Company, a corporation, and British Columbia-Yukon Railway Company, a corporation, defendants and defendants in error, a manifest error hath happened to the great damage of the said G. W. Roberts, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, State of California, within thirty days from the date of this writ, to wit, on the 24th day of May, 1902, to be then and there held, that the record and proceedings aforesaid be inspected that the said Circuit Court of Appeals may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24th day of April, 1902, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court, for the Ninth Circuit, District of Washington.

By H. M. Walthew,
Deputy Clerk.

The foregoing writ of error is hereby allowed this 25th day of April, 1902.

C. H. HANFORD,
United States District Judge Presiding in said Circuit Court.

United States of America,
District of Washington, } ss.
Northern Division.

The foregoing original writ of error is hereby admitted to have this day been lodged with me in my office in the courthouse of the United States Circuit Court, for the District of Washington, Northern Division, and at said time and place filed by me, said office being the office in which the record in said foregoing case then was, and wherein it now remains, and at the same time and place there was lodged with me and filed two copies of this writ, one for each of the adverse parties, the defendants in error herein.

Witness my hand and the seal of said Court this 26th day of April, 1902.

[Seal] A. REEVES AYRES,
Clerk.

By H. M. Walthew,
Deputy Clerk.

[Endorsed]: Original. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. G. W. Roberts, Plaintiff in Error, vs. Pacific & Arctic Railway and Navigation Company, et al., Defendants in Error. Writ of Error. Filed in the United States Circuit Court, District of Washington, April 26th, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. —.

Citation.

The President of the United States of America, to the Pacific & Arctic Railway and Navigation Company, and British Columbia-Yukon Railway Company, the Above-named Defendants in Error, and Each of Them, Greeting:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action wherein G. W. Roberts is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said

writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of April, 1902.

[Seal] C. H. HANFORD,
United States District Judge, Sitting as United States Circuit Judge, Ninth Circuit, District of Washington.

Service of the foregoing citation and receipt of copy thereof admitted this 28th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Defendants in Error.

[Endorsed]: Original. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. G. W. Roberts, Plaintiff in Error, vs. Pacific & Arctic Railway and Navigation Company, et al., Defendants in Error. Citation. Filed in the United States Circuit Court, District of Washington, April 28th, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

[Endorsed]: No. 840. In the United States Circuit Court of Appeals, for the Ninth Circuit. G. W. Roberts, Plaintiff in Error, vs. Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Washington, Northern Division.

Recorded May 19, 1902, and filed May 20, 1902.

F. D. MONCKTON,
Clerk.

No. 840

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC & ARCTIC RAILWAY & NAVIGATION COMPANY, and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

BALLINGER, RONALD & BATTLE,
and J. D. JONES,
Attorneys for Plaintiff in Error.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC & ARCTIC RAILWAY & NAVIGATION COMPANY, and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. 840

STATEMENT OF THE CASE.

This action was instituted by the plaintiff in error against the defendants in error by the filing of a complaint August 18, 1900, in the Superior Court of King County, Washington, alleging in substance (so far as deemed material to set forth the same) the corporate capacity of the defendants in error. That on December 16, 1898, the de-

fendants in error were doing business in the Territory of Alaska and State of Washington, and that they were organized for the purpose, among other things, of constructing, building and operating a railroad from Skagway to the summit of White Pass, Alaska, and from thence to Lake Bennett, and when constructed, to do a general business as common carriers in the transportation of freight and passengers over said railroad from Skagway to said summit and from thence to Lake Bennett. That prior to December 16, 1898, they had commenced the construction of the railroad from Skagway to the summit of White Pass, and from thence to Lake Bennett, and on said December 16, 1898, said railroad was under construction and was then largely completed as far as said summit, and that the prime object in the construction of said railroad was to transport thereover freight and passengers bound and en route from Skagway to Dawson City in the Northwest Territory and other points on the Yukon River, and on said December 16th, 1898, said freight and passengers it was intended to be transported over said railroad by the defendants in error from Skagway to the summit of White Pass, and to enable said passengers and freight to reach and be transported to the gold fields at and near Dawson City and other points on the Yukon River in Alaska, that they be hauled by wagons and sleds to be drawn by livestock from said summit to Lake Bennett. That the defendants in error, fully understanding that such freight and passengers of necessity must be transported by sleds and wagons from said summit to Lake Bennett, and as an inducement to passengers and the owners of freight to

take transportation from Skagway over said railroad then being constructed, that proper and suitable provisions should be made for transporting such freight and passengers from said summit to Lake Bennett, and that it was of vital importance to defendants in error in the operation of said railroad when completed, as an inducement to have passengers and the owners of freight ship over said railroad, that such provisions be made and facilities provided for the carrying of such freight and passengers from the temporary terminus of said railroad at said summit to Lake Bennett ; and being desirous that proper and suitable facilities should be made and provided for such transportation, did on December 16, 1898, at Seattle, Washington, make a proposition to the plaintiff in error, stating that they expected to haul from Skagway to said summit about 4000 tons of freight between January 15, and April 15, 1899, and they then accepted the rate given theretofore by plaintiff in error to them of $4\frac{1}{2}$ cents per pound from said summit to Lake Bennett for the hauling and transportation by plaintiff in error of such freight, and further proposed to plaintiff in error to divide with him and other parties in proportion to their carrying capacity, and further agreed to allow the sleds, harness and horses of plaintiff in error to be used in packing and hauling said freight from said summit to Lake Bennett, to be repaired at their blacksmith shops along the trail, and asked for an acceptance of said proposition from plaintiff in error. That prior to the making by the defendants in error to the plaintiff in error of said proposition, a conversation was had between plaintiff in error and

the agent and general traffic manager of the defendants in error, covering the matters above alleged, and further during said conversation plaintiff in error stated to said agent and general traffic manager, that he did not at that time own the necessary horses, sleds, etc., to do said freight business, but that he would provide himself therewith, and haul such freight, but that he would not so provide himself unless the defendants in error agreed to and would in good faith furnish him with the freight so to be carried, and that should he, (plaintiff in error) provide himself with such proper facilities, that he should expect and did expect the defendants in error, through their said agent and general traffic manager, in good faith to furnish and provide him with such freight as provided in said written proposal. That said written proposition of the defendants in error was received by the plaintiff in error on December 16, 1898, and was by plaintiff in error on December 17, 1898, at Seattle, Washington, in writing accepted by him, and he agreed to provide himself with the proper facilities; and that after December 17, 1898, relying upon the promises and agreements made as aforesaid, he purchased and procured twenty head of horses, and harness for each thereof, and the necesssary sleds, tools, implements, appliances, etc., at a total cost to him of $7,000 and took the same to said summit, and was in readiness to transport and haul such freight, all of which facts were fully known to defendants in error.

That at the time of making said contract, it was the expectation of both of the parties thereto, that said railroad would be completed and ready for operation to said sum-

mit by January 15, 1899, and plaintiff in error had procured said horses, etc., and was in readiness to enter upon the performance of said contract as early as January 10, 1899, but said railroad was not completed or ready for operation until February 17, 1899. That defendants in error intentionally and willfully broke and violated their said agreement, and willfully diverted from plaintiff in error to other parties all of the freight transported between said summit and Lake Bennett, and during the period of time covered by said contract, large and immense quantities of freight, to-wit: about 200 tons per day, was transported over said railroad, and that but for the violation of said contract, the plaintiff in error would have earned the gross amount of $220.00 per day for each team of two horses, and that by reason of the violation of said contract, plaintiff in error suffered damages in the sum of $50,000. (Record 1-8.)

Defendants in error filed their petition for removal of this cause from the State court to the Circuit Court of the United States for the District of Washington, Northern Division, on the ground of diverse citizenship, accompanying said petition with a bond on removal. The said petition for removal alleged, so far as regards the defendant in error, British Columbia-Yukon Railway Company, "that the same is a corporation duly formed, etc.," and furthermore alleged that the plaintiff in error was and is a citizen and resident of the state of Washington; and that the defendant in error Pacific & Arctic Railway & Navigation Company was and is a corporation organized and existing under and by virtue of the laws of the state

of West Virginia and that the defendant in error, British Columbia-Yukon Railway, is a corporation duly formed and existing under and by virtue of an act of the provincial legislature of the Province of British Columbia, Dominion of Canada, with its principal place of business at Victoria, in the Province of British Columbia, the place of its domicile. (Record 9-13.)

It will be observed, therefore, that the defendant in error, Pacific & Arctic Railway & Navigation Company was a corporation organized under the laws of the State of West Virginia, while the defendant in error, British Columbia-Yukon Railway Company, is a foreign corporation organized and existing under and by virtue of an act of provincial legislature of the Province of British Columbia, Dominion of Canada. It will furthermore be observed, that as regards the defendant in error British Columbia-Yukon Railway Company, said petition only alleged that "defendant is a corporation" but did not allege that the same "was" at the time of the institution of this suit or at any other time, a corporation organized as aforesaid.

Plaintiff in error in the state court objected to the granting of said petition for removal, for the reason and upon the ground that said Circuit court of the United States was without jurisdiction to hear and determine the same. (Record 15.)

The State court, however, granted said petition, and in addition thereto permitted the defendants in error to amend their petition for removal by inserting therein the words "was and" preceding the word "is," making the petition for removal read, so far as regards the British

Columbia-Yukon Railway Company, "was and is a corporation formed, etc.," to which permission to amend and order of removal plaintiff in error objected and excepted. (Record, 16-17.)

Upon the filing of the transcript upon removal in the Circuit court of the United States, plaintiff in error filed his motion to remand to the State court, on the ground that the said Circuit court was without jurisdiction to hear and determine the case (Record 18), which motion was denied by the Federal court (Record 25); and by reference to pages 19 to 24 of the record will be found the opinion of Judge Hanford setting forth his reason for denying the same.

Thereafter, defendants in error filed their answer, admitting certain allegations of the complaint and denying other allegations. (Record, 26-28.)

The case came on duly for hearing before the court and a jury, and a verdict having been rendered in favor of the defendants in error and the motion of the plaintiff in error for a new trial having been overruled and denied, and judgment rendered in favor of the defendants in error, plaintiff in error has brought the case to this court by writ of error (Record 29-65), and has made the following assignments of errors:

I.

That the United States Circuit court, in and for the District of Washington, Northern division, erred in over-

ruling the motion filed in this cause in this court by plaintiff to remand this case to the Superior court of King County, Washington, in which said cause was instituted, and in making, rendering and entering the judgment herein overruling and denying said motion.

II.

The court further erred in admitting, over the objection of the plaintiff, the testimony of L. H. Gray, a witness for the defendants, the full substance of which testimony is as follows:

That after the plaintiff arrived in Alaska with his horses, sleds, outfits, etc., I, L. H. Gray, notified him personally that we (meaning the defendant companies) could not give him any freight on account of the high rates he wanted for hauling the same from the summit of White Pass to Lake Bennett, and I notified him, the plaintiff, and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett; whereupon the plaintiff stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told him the freight must be hauled for in order that we could compete with the Dyea trail.

And in receiving in evidence defendant's exhibit No. 2 referred to and set forth in the bill of exceptions; and in permitting said witness to testify that he notified plaintiff that he must make still lower cut to Lake Bennett, and that plaintiff then stated that he did not want freight upon those rates.

III.

Error of the court in sustaining the objections of the defendants to the following questions propounded by the attorney for the plaintiff to the witness R. M. Hester:

Q. Are you acquainted with one J. A. Powell?

A. I am.

Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken up to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between himself and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett?

To which questions counsel for the defendants interposed the following objection:

"I object for the reason that any statements of this witness, unless made in our presence, would be improper and not rebuttal testimony." Which objection the lower court sustained.

ARGUMENT.

The plaintiff in error contended that the lower court erred in overruling his motion to remand this cause to the Superior court of King county, and in making and rendering the judgment overruling said motion.

(*a*) It will be borne in mind as a conceded fact in this case, that one of the defendants in error is a corporation organized under the laws of the state of West Virginia, while the other defendant in error is an alien, being organized and existing under and by virtue of an act of the

provincial legislature of the Province of British Columbia, Dominion of Canada.

The rule applicable, therefore, to the facts of this case, is tersely stated in Black's Dillon on Removal of Causes as follows:

"Consequently, the defendants cannot remove a suit, although he is an alien, if it is brought in a court of the state in which he has a residence. Further, an alien defendant cannot remove the suit unless he is the only defendant, or unless all the other defendants are also aliens. Nor can he remove the suit if one or more of the plaintiffs is an alien. The language of the constitution and of the removal act, 'a controversy between citizens of a state and foreign states, citizens or subjects,' applies only to cases where all the parties on one side of the controversy are citizens of one of the states and all the parties on the other side of the controversy are aliens."

Black's Dillon on Removal of Causes, Section 68.

"When there are several plaintiffs or several defendants in the cause, and a removal is asked on the ground of diverse citizenship, it is necessary that all of the parties on one side of the controversy (except merely nominal or formal parties, or parties improperly joined, whose citizenship may be disregarded) should be citizens of a different state or states from all of the parties on the other side. * * * * * It is therefore necessary that all the parties on one side of the case should be citizens of a state or states and all the parties on the other side aliens. If the defendant is an alien and one of the plaintiffs is also an alien, though the others are citizens of a state, the Federal court has no jurisdiction. If there are two plaintiffs, one of whom is a citizen of the same state with the defendant and the other an alien, or if there are two defendants, one of whom is a citizen of the same state with the plaintiff and the other an alien, the case is not removable because the community of citizenship will prevent it. But a different question is presented when a plaintiff, citizen of the state

where the suit is brought, sues two defendants, one of whom is a citizen of another state and the other an alien. Here there is no community of citizenship between any of the parties. Yet the cause is not removable because it does not come within any of the provisions of the statute. It is 'casus omissus.' It cannot be said to be a controversy 'between citizens of different states,' because one of the parties is not a citizen; and it cannot be described as a controversy 'between citizens of a state and foreign citizens or subjects,' because one of the defendants is not a foreigner.''

Black's Dillon on Removal of Causes, Section 84.

See also:

Desty's Federal Procedure, Vol. 1 (9th ed.), page 472.

Tracy vs. Morel, 88 Fed. 801.

Connely vs. Taylor, 2d Peters, 556.

Sawyer vs. Switzerland, etc., Fed. Cases No. 12408.

Rooker vs. Crinkley, 18 S. E. 56.

Woodrun vs. Clay, 33 Fed. 897.

Calderwood vs. Braly, 28 Cal. 97.

People vs. Hager, 20 Cal. 167.

Welch vs. Tennant, 4 Cal. 203.

Crane vs. Sutz, 30 Mich. 453.

We also call attention to the case of *King vs. Cornell,* 106 U. S. 395. On page 398 of this case, as will be observed from the language of the court, an alien was denied the right to remove the case from the State to the Federal court because the law of 1875 (which repealed Sec. 639 of the Revised Statutes) did not *expressly* grant him the

right of removal when made a joint defendant with a citizen of the United States; the court holding that the Act of 1875 did not give the right of removal to an alien even though a separable controversy existed.

This, therefore, we submit, is an authority bearing upon the proposition at bar, and the court in this case denying the right of removal because Congress had not expressly granted the same, we submit is an authority upon the case at bar, and supports the contention of the text writers above cited, that Congress not have *expressly* granted the right of removal where an alien is sued with a citizen, such right of removal does not exist.

In *Merchant's Cotton Press Co. vs. Ins. Co. of N. A.*, 151 U. S. 368, the court on page 386 says:

"* * * * * besides it is settled by *King vs. Cornell,* 106 U. S. 395, that subdivision 2 of Section 639 of the Revised Statutes was repealed by the Act of 1875 so that an alien sued with a citizen had no right of removal, and this subdivision two of that section was not restored by the act of March 3, 1887; hence an alien in the position of the alien petitioners in the present case, would have no right to remove the cause on the ground of a separable controversy."

(*b*) Furthermore, the amendment made to the petition for removal not being within the time defendants in error were required by the laws of the State of Washington to answer or plead to the complaint of the plaintiff in error, could not be amended in the particular in which the same was amended.

Black's Dillon on Removal of Causes, Secs. 163 and 181.

(*c*) The petition for removal, even as amended, is

faulty, in that it fails to allege the necessary jurisdictional facts entitling the defendants in error to remove said cause to the Federal court.

The complaint of the plaintiff in error does not allege the citizenship or place where the defendant in error, British Columbia-Yukon Railway Company was organized (Record 1); but defendants in error in their petition for removal, set forth for the first time the fact that the same was a corporation incorporated under an act of the provincial legislature of the Province of British Columbia. The petition, however, as amended, reads that each of the defendants in error "was and is a corporation duly formed and existing under and by virtue of the laws of West Virginia and the Province of British Columbia respectively," (Record, 9-10.)

It now appears from the record of this case that either of the defendants in error was at the *time* of the institution of this suit corporations organized as aforesaid.

" * * * * Furthermore, since the Federal court will not take jurisdiction of the cause unless the requisite diversity of citizenship between the parties existed at the time of the commencement of the action in the state court, as well as at the time the removal is asked for, a petition which merely alleges that one or other of the parties 'is' a citizen of a given state will not be sufficient. The Federal court will not be enabled to take jurisdiction unless the petition distinctly alleges the relative citizenship of the parties at the time of the institution of the suit in the state court, and also at the time of the filing of the petition for removal and shows that it was then, and still is diverse."

Black's Dillon on Removal of Causes, Sec. 181, p. 284.

" * * * * It is otherwise under the judiciary act, where it must be affirmatively shown that the requisite citizenship existed at the commencement of the action."

Desty's Fed. Procedure, Vol. 1 (9th ed.), Sec. 108, p. 523.

The right of removal must be determined by the pleadings at the time the petition is filed.

Graves vs. Corkin, 132 U. S. 571.

Merchant's Cotton Press Co. vs. N. A. Insurance Co., 151 U. S. 368.

A petition for removal which alleges the diverse citizenship in the present tense is defective.

Stevens vs. Nichols, 130 U. S. 130.

Brown vs. Allen, 132 U. S. 27.

Campaign vs. Hall, 137 U. S. 61.

Crohore vs. Ohio, etc., 131 U. S. 240.

The lower court erred in admitting over the objections of the plaintiff in error, the testimony of one L. H. Gray, a witness for the defendants in error as set forth in the second assignment of error.

By reference to the first exception taken by plaintiff in error (Record, 36-48) it will be observed that the plaintiff in error introduced in evidence testimony tending to establish the contract as alleged by him. Said Gray was then, over the objection of the plaintiff in error, permitted to give testimony tending to show that said contract was either rescinded or modified, and the defendants in error exhibit No. 2 admitted in evidence by the lower court over

the objection of the plaintiff in error, had the same effect. Said Gray was permitted to testify as follows:

"After Mr. Roberts arrived in Alaska with his teams, outfit, etc., I notified him personally that we could not give him any freight on account of the high rates wanted from the summit to Lake Bennett, and I notified him and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett, whereupon the plaintiff (Roberts) stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told him that the freight must be handled for in order to compete with the Dyea trail."

That after said Roberts arrived in Alaska with his horses, teams, outfit, etc., that he, the plaintiff, signed a document received in evidence marked "Defendants' Exhibit No. 2," which is as follows:

"Skagway, Alaska, February 15th, 1899.

Mr. L. H. Gray, G. T. M., W. P. & Y. R., Seattle, Washington.

Dear Sir:—We, the undersigned, hereby agree to protect the following freighters' rates during good sledding:

Between Heney and Summit.....1c per pound
Between Summit and Log Cabin.....1c per pound
Between Summit and Lake Bennett.....2c per pound
Between Log Cabin and Lake Bennett..1c per pound

If absolutely necessary to protect Dyea competition and packers' rates from Skagway, we will confer with you and arrange some satisfactory basis of rates.

Yours truly,
G. W. ROBERTS,"

And that thereafter the said Gray notified plaintiff that he must make a still lower cut in the freight rate from the summit to Lake Bennett, and that the plaintiff stated that he did not want any freight upon those rates, to the admission of all of which said testimony and of said paper

writing marked Defendants' Exhibit No. 2, the plaintiff duly excepted, which exception was allowed by the court.

It is respectfully submitted that the effect of this testimony and exhibit tended to show, if not the entire rescission or release of said contract, at least a modification thereof.

By reference to the answer of defendants in error (Record, 26-28) and the pleadings of this cause, it will be observed that no new matter in confession or avoidance of said contract as alleged by plaintiff in error, was pleaded by the defendants in error, and in fact the answer of the defendants in error is merely an answer of general traverse, simply admitting or denying the allegations of plaintiff's complaint.

"A release or rescission and all matters in avoidance of a cause of action, must be specially pleaded by the defendant."

Ency. of Pleading & Practice, Vol. 1, pp. 849 and 851.

We submit that the instruction given by the court to the jury touching this matter did not have the effect of curing the error in admitting in evidence said testimony and exhibit (Record, 47-48).

The lower court erred in sustaining the objection propounded to the witness R. M. Hester, as set forth in the third assignment of error (Record, 54).

The detailed facts touching this matter are as set forth in exception No. 2 (Record, 44-47), from which it appears that this cause was set for trial on June 25, 1901, and that after the same was set for trial, the defendants in error made application to the court for a continuance

on the ground that one J. A. Powell was a material witness on behalf of the defense; and the application for continuance set forth that said Powell, if present, would testify that the plaintiff in error did not at the time of making the alleged contract set forth in his complaint, or at any time thereafter, have any pack horse or other animals at Skagway that he could use for the purpose of packing, etc., as alleged by plaintiff in error.

To avoid a continuance of the cause plaintiff in error agreed that the said Powell would so testify if present. Said admission was introduced in evidence and to contradict and rebut such testimony, the plaintiff in error introduced one R. M. Hester, and the questions and answers and the ruling of the court which it is claimed constituted error, are as follows:

"Q. Are you acquainted with one J. A. Powell?"
"A. I am."
"Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between himself and the defendant companies in this case for the transportation of freight from the summit to Lake Bennett?"

To which questions counsel for the defendants in error interposed the following objection:

"I object for the reason that any statement of this witness unless made in our presence, would be improper and not rebuttal testimony." Which objection was allowed by the court (Record, 46).

The sole ground, therefore, of the objection to the question and proposed testimony, was, that inasmuch as the

statements made by said Powell were not made in the presence of the defendants in error, the same would be improper, and not rebuttal testimony.

We submit that this objection was not valid or tenable, and that the court erred in sustaining the objection to the proposed testimony, upon the grounds made by counsel for defendants in error.

The proposed testimony was not obnoxious to the objection that the same was either improper or not rebuttal testimony. Furthermore, the objection of being improper is so general that a valid objection could not be predicated thereon, and such testimony certainly was proper rebuttal testimony.

Thompson on Trials, Vol. 1, Sec. 693, 694.

"Where the objecting party states the ground of his objection, it is incumbent upon him, if he would save an exception to the overruling of it, which will be available on error or appeal, to state a valid ground. If he fails to do this, his objection will not avail him, although he might have stated a valid ground." * * * *

Thompson on Trials, Vol. 1, Sec. 698.

See also:

Thompson on Trials, Sec. 690.

We submit that the only valid ground of objection that could have been interposed to the question proposed to the witness Hester, was that the same impeached or contradicted the witness Powell without the attention of the witness Powell being directed to the statement at the time, place and circumstance thereof. Suffice it, however, to say that the objection was not made upon this ground.

Furthermore, it will be remembered that Powell was not a witness in person. It was simply admitted that if he were present he would testify as set forth in said appli-

cation for a continuance, and the plaintiff in error never had the opportunity of propounding to him an impeaching question.

In any event the correct rule is set forth by Thompson on Trials, Volume 1, Section 498, as follows:

"The grounds on which the foregoing rule, which requires a foundation to be laid by first interrogating the witness on cross-examination, is usually put, is that it is the right of the witness to have the opportunity of explaining. If it is a *privilege* personal to him, it would seem to follow that it can not be *waived* by the party whose witness he is, without his consent; but that if the impeaching testimony is introduced without the foundation first being laid, he has the *right* of subsequent explanation. We find, however, that it has been held competent for a coroner's clerk to read, for the purpose of contradicting a witness in a criminal trial, his previous deposition, taken before the coroner and subscribed and sworn to by him, without asking him on cross-examination concerning the making of such deposition, where no objection is made to the reading of it on that score."

So that in the case at bar the objection was not made to the testimony of the witness Hester upon *that score.*

The testimony of the witness Hester was of vital importance to the plaintiff in error. To avoid a continuance of the cause he was willing to admit that the witness Powell would testify that the plaintiff in error did not, at the time of the making of the alleged contract or at any time thereafter, have any pack horses or other animals at Skagway or elsewhere that he could have used for the purpose of packing, drawing or hauling goods, wares and merchandise as alleged by him in his complaint, and that he was not at that time, or thereafter, possessed of any facilities, appliances, tools, machinery or otherwise, for

packing, drawing or hauling goods from White Pass to Bennett or anywhere else, etc.

This admission was offered in evidence by the defendants in error.

Now it was proposed to prove by the witness Hester, that this same witness Powell stated to him that horses were taken by Roberts to Alaska for the purpose of carrying out the contract claimed by Roberts, plaintiff in error, to have then existed between him and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett. How can it be said that the jury did not find that Roberts did not equip himself with the necessary outfit or take the same to Alaska for the purpose of carrying out said contract? But if all of the testimony in this case was before this court we believe that this court would conclude that the jury believed from the evidence that Roberts did not equip himself or provide himself with the requisite facilities for the carrying out of the contract. He was denied the privilege of disproving the statement of the witness Powell upon this most important and vital proposition.

For the reasons above set forth, it is respectfully submitted that this cause should be reversed and remanded for a new trial.

Respectfully submitted,
BALLINGER, RONALD & BATTLE,
and J. D. JONES,
Attorneys for Plaintiff in Error.

No. 840.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY,
AND
BRITISH COLUMBIA YUKON RAILWAY COMPANY,
Defendants in Error.

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF DEFENDANTS IN ERROR.

JOHN P. HARTMAN,
SEATTLE, WASHINGTON. *Attorney for Defendants in Error.*

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STATEMENT OF FACTS.

We are quite content with the statement of facts of plaintiff in error, except that in some places it is very brief, and a reference to and reading of the record is necessary to get a complete understanding of the issue.

ARGUMENT.

I.

FIRST ASSIGNMENT OF ERROR.

1.

The first assignment of error relates to plaintiff's motion to remand the case to the state court. This question was argued at length before Judge Hanford, and his able, exhaustive and well-considered decision is found on page 19 of the Transcript of Record. At that time, after the argument, we submitted a brief to Judge Hanford, and believe that we can best present the question now by setting forth that brief, which is as follows:

In this cause the plaintiff is a resident and citizen of the State of Washington, and the defendant corporations are citizens respectively of West Virginia and British Columbia. It is conceded that if this case were one against either of the defendants singly there would be no question about the defendants' right to remove. Then the question at issue is: Can defendants, one an alien, and the other a citizen of a State diverse from the plaintiff, remove the cause?

Plaintiff cites as authority Par. 68 of Black's Dillon on Removal. On page 95 the author uses this remarkable language:

"The language of the constitution and of the removal act, 'a controversy between citizens of a state and foreign states, citizens or subjects,' applies only to cases where all the parties on one side of the controversy are

citizens of one of the states and all the parties on the other side of the controversy are aliens."

To substantiate this remarkable conclusion the author cites Hervey vs. The Illinois Midland Railway Co., et al., 7 Bissell, 103. A careful perusal of the opinion in this case discloses that the controversy was between the plaintiffs, residents of the State of Illinois and aliens, and defendants, residents of the State of Illinois and aliens. One sentence in the opinion is interjected which might give the author some hope in his assertion, but it was not the question before the court. No one contends but that the conclusion reached in the Hervey case is correct.

Another case cited is that of the Merchants' Cotton Press Company against Insurance Co., et al., 151 U. S. 368. There the defendants were residents of the State where the suit was brought, of other States in the Union, and of foreign countries. The author also cites King vs. Cornell, 106 U. S. 395. In that case, the plaintiff, a citizen of New York, sued a citizen of the same State, and an alien subject of Great Britain. Held, of course, that removal could not be had.

Tracey vs. Morel, 88 Fed. Rep. 801, quotes Black's Dillon, but the controversy there was that between plaintiff and defendants, citizens of the same state, and another defendant, an alien.

So far as we have been able to discover authorities the question in point has not been decided. Several times the courts have laid down principles which help to determine this controversy.

In the famous Sewing Machine Companies Cases, 18 Wall. 553, commented upon at length by the editor in 12 Am. Reports, 545, the following doctrine is laid down:

"These expressions in the act of congress where an alien is a party, or the suit is between a citizen of a state where the suit is brought and a citizen of another state, says Marshall, Ch. J., the court understands to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal courts; or, in other words, that where the interest is joint, each of the persons named in that interest must be competent to sue or be liable to be sued in the court to which the suit is removed. Strawbridge, et al., vs. Curtis, et al., 3 Cranch 267. Connolly vs. Taylor, 2 Pet. 564; Curtis Com., par. 75."

And again, p. 546,

"Corporations, it is true, are now regarded by this court as inhabitants of the state by which they are created and in which they transact their corporate business, and it is also held that a corporation is capable of being treated as a citizen for all purposes of suing and being sued in the circuit court, but the rule as modified in that regard does not diminish the authority of those cases as precedents, to show that by the true construction of the judiciary act it requires that each of the plaintiffs, if the interest be joint, must be competent to sue each of the defendants in the circuit court to sustain the jurisdiction under the 11th section of that act. Marshall vs. Railroad, 15 How. 325; Railroad vs. Wheeler, 1 Black 295; Drawbridge Co. vs. Shepherd, 20 How. 227; S. C. 21 id. 112; Coal Co. vs. Blatchford, 11 Wall. 172."

In Creagh vs. Equitable Life Insurance Society, 83 Fed. R. 849, the following doctrine is announced (p. 851):

"The right of removal is given to a defendant who is a non-resident of the state in which the action is commenced, whether said defendant be an alien or a citizen of another state."

This construes the act of 1887, amended in 1888, regarding the removal of causes.

After the word "sustained" 4th line, 4th st.
cite,
Virginia Carolina Chemical Co. vs. Sur
108 Fed. 453

[illegible] will be sustained. The plaintiff could have sued the defendants direct in the circuit court; in fact it is a common practice in the great railway foreclosure suits to join foreign (alien) and domestic (formed in any state) corporations in suits originally brought in the circuit court.

This whole question was ably argued by plaintiff's counsel before, and carefully considered by, the learned Judge in the Superior Court. The conclusion there reached was that, as plaintiff had the right to sue in the circuit court in the first instance and sustain jurisdiction, the right of removal was unquestioned. To take any other view would give rise to serious abuse of the statute.

A plaintiff bringing suit, and desiring to prevent removal, need only to join an alien with the real party in interest and when the suit is tried on the merits let judgment be rendered in favor of the nominal defendant with

a penalty only of the costs to this defendant in the action. In enacting the law Congress evidently intended that the merits of the law should be enforced and that technical conclusions should never be adopted in construing the act.

Section 1 of the Act of August 13, 1888, amending the Act of 1887 (Supplement U. S. Statutes, Vol. 1, 2nd ed., 1874-1891) provides that the circuit court shall have original jurisdiction in suits in which there shall be a controversy between citizens of different states * * * or between citizens of a state and foreign states, citizens or subjects, etc.

The different persons are connected by "or," but it seems clear that that would be construed as meaning "and" when different parties coming within the rule are joined as defendants; that is, if a citizen of a different state and an alien are joined as defendants then the "or" would read "and." This is further strengthened by the second paragraph of Sec. 2, which is as follows:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper District by the defendant or defendants therein, being nonresidents of that state."

This last quotation is an addition to the old removal acts. It would seem that Congress contemplated that a citizen of a different state from the plaintiff and an alien

might be joined as defendants, and they therefore used the plural and added "being non-residents of that state."

A proper, just, and liberal construction of the statute cannot be had if the unsupported rule laid down by Black is to govern.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or absurd conclusion.

Lau Ow Bew vs. U. S., 144 U. S. 47.

A statute must be construed so as to carry out the intent of the legislature with reason and discretion, though such construction may seem contrary to the spirit of the statute.

U. S. vs. Buchanan, 9 Fed. R. 689.

Statutes should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it.

Bernier vs. Bernier, 147 U. S. 242.

All former statutes on the same subject, whether repealed or unrepealed, may be construed in considering provisions that remain in force.

Viterbo vs. Friedlander, 120 U. S. 707.

A law is the best exposition of itself; every part of an act is to be taken into view for the purpose of discovering the mind of the legislature.

Pennington vs. Coxe, 2 Cranch 33.

If in a subsequent section of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing the phrases.

Alexander vs. Alexandria, 5 Cranch 1.

It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word, and every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.

Washington M. Co. vs. Hoffman, 101 U. S. 112.
Platt vs. U. P. R. R. Co., 99 U. S. 48.

If a literal interpretation of any part would operate unjustly, or absurdly, or contrary to the meaning of the act, it should be rejected. The construction must be such that the whole can stand, if possible.

Heydenfeldt vs. Daney G. & S. Mining Co., 93 U. S. 634.

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over the letter.

U. S. vs. Kirby, 7 Wall. 482.

2.

Recurring now to the brief of plaintiff in error we find that the only authorities cited that are not fully covered in the opinion of Judge Hanford, and shown by the above to have no application, are the following:

In Rooker vs. Crinkley, 18 S. E., it seems that the reason for refusing to remove was that the alien was a resident of the State, although the opinion is so brief that it is not clear just what the North Carolina Court did de-

cide in this case. However the Court may have had under consideration Section 2 of Act of August 13, 1888 *supra,* and found that the defendant (an alien) not "being a non-resident of the state," was properly sued in the state court. If he came there to reside, and not as a convenience to carry on business, he must submit to the state courts' jurisdiction. This rule is well known and seems right, but has no application to the case at bar.

Counsel likewise cite 33 Fed. 897, 28 Cal. 97, 20 Cal. 167, 4 Cal. 203, 30 Mich. 453, but with what force we are at a loss to understand, for in each of these cases one of the defendants at least was a resident and citizen of the same state with the plaintiff, and in such cases no one doubts the soundness of the ruling which thus construes the statute. Citizenship of *all* defendants must be diverse to plaintiff, else removal is denied. Further, all of these cases, except the 33 Fed., construe the statute as it existed previous to the amendments of 1875 and the amendments again of 1887-1888. These state authorities are therefore without point because they construe a law which has been changed by amendment, the amendment being in force so far as the case at bar is concerned.

Counsel for plaintiff lay considerable stress upon the case of King vs. Cornell, 106 U. S. 395, and we desire to call the court's particular attention to the comment thereon by Judge Hanford in his decision on this question. In this case one of the defendants was a resident of the same state with the plaintiff, and the only support that the

plaintiff in this cause derives from the decision is the mere dicta of the court, and as such it should not control the decision of this court.

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohens vs. Virginia, 6 Wheat. 264, and cited approvingly in U. S. Insular cases, 182 U. S. 258.

3.

Next counsel contend that the amendment to the petition for removal was made too late. To answer this unsupported assertion we beg to call the Court's attention to the cases cited on this point herein and to those relied upon in the opinion of Judge Hanford.

4.

Then again counsel claim that the petition is faulty in that it does not fully or completely enough disclose the incorporation of the alien corporation. They say it must show that at the *time* of the institution of the suit the alien was a corporation, citing again Black's Dillon and following add: "The right of removal must be determined

by the pleadings at the time the petition is filed." This ground was urged when the case was before the state court. The learned judge then himself answered that by saying that if it was not clear in the petition that the alien was a corporation at the time the suit was instituted it was so stated in the complaint and plaintiff could not be heard to dispute his own allegations.

Further the plaintiff in error has no well-considered authority to sustain his technical grounds to the petition for removal. The only authority cited by the plaintiff is Black's Dillon, Removal of Causes, Sec. 171 (erroneously cited in plaintiff's brief as Sec. 181), and in this very section the author uses the following language:

"It is true the record in the case may be looked to in aid of the petition, and that the Federal Court will not be obliged to remand the case on account of defective averments of citizenship in the petition if the record affirmatively shows diversity of citizenship."

The same doctrine is laid down in the case of Steamship Co. vs. Tuggman, 106 U. S. 118, where Mr. Justice Harlan uses the following language:

"It is not always necessary that the citizenship of the parties be set out in the petition for removal. The requirements of the law are met, if the citizenship of the parties to the controversy sought to be removed is shown affirmatively by the record of the case."

In the case at bar the complaint sets out fully these facts and shows the diverse citizenship of the parties both at the time the cause of action accrued and at the time

the action was commenced. The same doctrine is laid down in Railway Co. vs. Ramsey, 22 Wall. 322; Robertson vs. Cease, 97 U. S. 646.

When the matter came up before the Superior Court defendant, under leave of the Court, amended his petition by inserting the words "was and." According to the authorities such an amendment may be allowed even after the case comes before the Federal Court. In the case of Tremper vs. Schwabacher, 84 Fed. 415, it was held that where the jurisdictional facts are stated in an imperfect manner in a petition the Federal Court may allow amendments for the purpose of making a good record. The opinion in this case is so exhaustive and the facts and circumstances so nearly identical with the case at bar that it is wholly unnecessary to cite further authorities.

Moreover such an amendment is unnecessary, as shown in

Dodge v. Tulleys. 144 U. S. 456, and
Shaw v. Quincy Mining Co., 145 U. S. 444-453,

which cases are cited and relied upon by Judge Hanford in his opinion.

In the light of all the authorities cited above we confidently assert that the Circuit Court has jurisdiction and the case should not be remanded.

II.

SECOND ASSIGNMENT OF ERROR.

5.

Plaintiff's second assignment of error relates to the introduction of defendants' exhibit No. 2, and the testimony of L. H. Gray in connection therewith. The causes which led to the introduction of this testimony are as follows: The alleged contract sued upon by the plaintiff was embraced in two letters, plaintiff's exhibits A and B, which were referred to in paragraph 5 of the complaint, and copies thereof furnished defendants upon demand, and numerous conversations between Gray and plaintiff at Seattle, Skaguay, and elsewhere. Both sides were given large latitude, for the court wanted to determine whether there was any contract.

The plaintiff was not restricted to the letters, exhibits A and B, but was allowed to introduce oral evidence to prove, if possible, whether there was a contract or not between the parties. It was for this reason only, viz., to prove whether or not there was any contract, that the court allowed the introduction of defendants' exhibit No. 2. If there was any error in the introduction of this exhibit, we contend that it was cured by the testimony of L. H. Gray (page 15 of plaintiff's brief) that the proposition of plaintiff was not accepted. Under such circumstances, of course, there could be no recission or modification of the contract. Moreover, the Court expressly charged the jury (Transcript of Record, pp. 46, 47 and

48) that they should not consider this exhibit as a recission or modification of the contract, in the event that they found that a contract existed. Nothing can be clearer than the Court's instructions and no one could complain unless it was the defendants. It certainly did not in any way injure the plaintiff.

We also contend that if there was error in the introduction of the testimony of Witness Gray it is not reviewable in this Court, because the testimony is not made a part of the transcript of record. C. C. A. Rule 11, 80 Fed. 228.

It is unnecessary to cite the innumerable authorities which hold that error in admitting testimony is harmless, unless it appears to have been prejudicial to the party complaining. Furthermore, the error, if there was error, was cured by the instructions of the Court.

The judgment of the Court below will not be reversed because of the erroneous admission of evidence when the record shows that such evidence was so explained in the instructions of the Court to the jury that it worked no prejudice to the appellant.

Cadman vs. Markle, 43 N. W. 315, 5 L. R. A. 707.
Seeley vs. Garey, 109 Pa. St. 301.

Error in admission of evidence that becomes immaterial under an instruction is not ground for complaint.

Wreggitt vs. Barnett, 99 Mich. 477.

The admission of immaterial evidence is harmless when the instructions to the jury have clearly indicated

that it could not be considered upon the only question as to which its admissions might do harm.

Sunset T. & T. Co. vs. Day, 70 Fed. 364, 44 U. S. App. 58.

We believe that a careful consideration of the facts and the law will leave no doubt that the introduction of Exhibit 2 was proper and constituted no error.

III.

THIRD ASSIGNMENT OF ERROR.

6.

The third assignment of error relates to the refusal of the Court (not defendants' objection to the question) to allow the introduction of testimony of the witness Hester, but counsel discuss at length defendants' objection only. The Court's ruling does not appear in the bill of exceptions nor in the record, but defendants' objections appear only. It was the Court's ruling (not defendants' objection) that prevented the answer. Then how can this Court determine whether the answer would have availed? It is a well-known rule, without exception that before one can avail himself of the Court's error, if error, in refusing the answer to a question, that the party ruled against must then make his offer. Failure to do this is fatal. Plaintiff made no offer. There is therefore no available error. This rule is laid down in Thompson on Trials, Sec. 678, where the author among other things says:

"Where there is in the bill of exceptions neither a formal offer of evidence, nor any statement of what the witness will testify to, there is no available error."

State vs. Lewis, 22 Pac. R. 244.

The contention of plaintiff is that the grounds offered by defendants in support of this objection are not valid, and cites in support of this contention several sections of Thompson on Trials. We fail to see what bearing these sections can have upon the point at issue, since the objection of defendants was sustained by the Court and they are not seeking to avail themselves of an error on appeal. In fact, the latter part of Sec. 698 of Thompson on Trials cited by plaintiff's counsel sustains us and is against the position of plaintiff. Defendants are quite satisfied. If plaintiff is not, let him bring before this Court the Court's error.

On page 18 of their brief counsel for plaintiff give what would be valid grounds for the Court's action. That might have been the grounds for the Court's action, if his ruling were known.

Plaintiff is evidently seeking to avail himself of an error of the defendants' counsel and not an error of the Court, since the ruling of the Court is not made part of the record and is therefore not reviewable in this court.

Arambula vs. Sullivan, 16 S. W. 436.
State vs. Lewis, 22 Pac. Rep. 241.
Jones, et al., vs. Currier, 22 N. W. 663.
Bowen vs. Pollard Admrs. 71 Ind. 177.

After citation page 17 add:
Dresser vs. C. P. N. Co. 116 Fed. 281 (285).

Plaintiff admits that there was a valid reason for not admitting this testimony, viz., that it impeached the testimony of the witness Powell. There was clearly no error of the Court in rejecting this testimony.

The Charles Morgan, 115 U. S. 69.

7.

We submit that the plaintiff in error has failed to show affirmatively that there was error in the rulings of the Court below. The verdict was a general one for the defendants in error. The presumption therefore is in their favor, and we believe that this Court will not disturb that verdict upon such an incomplete presentation of the case as is made by the transcript of record which has been filed herein. The record of the testimony is so incomplete that it would be impossible to determine intelligibly whether the rulings were correct or not, even if they had been fully set out, but the record fails not only to set out the testimony but also the grounds for the Court's ruling, and it must therefore be merely a matter of conjecture as to what the testimony was, and what was in the mind of the Court in passing upon it.

With full confidence in the rulings of the lower court, this case is

Respectfully submitted,

JOHN P. HARTMAN,
Attorney for Defendants in Error.

No. 840.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY,
AND
BRITISH COLUMBIA YUKON RAILWAY COMPANY,
Defendants in Error.

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Supplemental Brief of Defendants in Error.

JOHN P. HARTMAN,
SEATTLE, WASHINGTON. *Attorney for Defendants in Error.*

IN THE

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STATEMENT OF FACTS.

Since preparing our brief in this cause, we have discovered other authorities and comments which have an important bearing upon the removal question at issue, and we desire to call the Court's attention to these cases, so

that the matter may be presented with all the light that can be thrown upon it.

The case of Balin *et al.* vs. Lehr *et al.*, 24 Fed. 193, was a suit between a citizen of New York and of New Jersey as plaintiff, and a citizen of Maryland and of Prussia as defendants. The Court there held that under the statute the cause was clearly removable to the Circuit Court.

In the Law Notes of November, 1901, will be found a very interesting comment upon this question, and upon the decision of Judge Hanford. The editor's views are such a strong presentation of the question that a full reading will be of great profit. Then again the principle is so fully commented upon that it shows a careful and comprehensive study of the question, and is therefore a worthy compliment upon the carefully considered opinion of Judge Hanford. We quote in part from the editor's comments:

"Several cases decided by the United States Supreme Court have, in our opinion, a legitimate bearing on this question. Section 687 of the United States Revised Statutes provides that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original but not exclusive jurisdiction.' It will be observed that a controversy between a State as plaintiff against another State together with a citizen of the latter 'does not come within any of the provisions of the statute,' and is a *causus omissus*, using

the language of the text writer above quoted. Moreover, such a controversy is one over a part of which the Supreme Court is given exclusive jurisdiction and over the other concurrent jurisdiction. Nevertheless in Missouri v. Illinois *et al.*, 180 U. S. 208, the Supreme Court held that it had jurisdiction of a suit by a State against another State and a corporation of the latter State. A demurrer for want of jurisdiction was overruled, and it does not appear that the court or counsel suggested an objection that such defendants could not be joined where there was a joint interest. South Carolina v. Georgia, 93 U. S. 4, was a suit in equity brought in the Supreme Court whereby the State of South Carolina sought an injunction to restrain the State of Georgia, the United States Secretary of War, the Chief Engineer of the United States Army, their agents and subordinates, from obstructing the navigation of the Savannah River, and the court assumed jurisdiction thereof, but dismissed the bill on the merits. Louisiana v. Texas, 176 U. S. 1, was a suit brought in the Supreme Court by the State of Illinois against the State of Texas, her governor and her health officer. Here again it may be observed that the court did not decline jurisdiction, but exercised it in holding that the facts alleged in the bill did not justify the court in granting the relief sought. The cases of New Hampshire v. Louisiana and New York v. Louisiana and the several officers of that State who composed a board of liquidation. The bills were dismissed, but not for want of jurisdiction arising out of the fact that citizens and States were joined as defendants. It seems to us that the clear implication from the foregoing cases strongly supports Judge Hanford."

We have full confidence that this Court will place the broad construction upon this Statute which justice requires, that the purposes for which the law was enacted may not be defeated, to-wit: That all parties to an action may have a fair and impartial tribunal where their rights may be determined.

Respectfully submitted,

JOHN P. HARTMAN,

Attorney for Defendants in Error.

No. 840

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. W. ROBERTS,
Plaintiff in Error

vs.

PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY
AND
RRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON NORTHERN DIVISION

PETITION FOR RE-HEARING

JOHN P. HARTMAN,
SEATTLE, WASHINGTON — *Attorney for Defendants in Error*

OGDEN & CO. PRINTERS, 111 MARION, SEATTLE

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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vs.
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No. 840

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON NORTHERN DIVISION

PETITION FOR RE-HEARING

I.

Defendants in error pray that a rehearing of this cause may be granted, for the reason that the question decided in the opinion rendered herein by this Honorable Court was not directly before it, and was not argued by counsel.

It was apparent to counsel for defendants in error from the very inception of this cause that the question as

to whether or not the letters which passed between Roberts and Traffic Manager Gray constituted a contract was of vital importance. Accordingly upon the trial of the case in the Court below defendants in error argued the matter at length before the Court, upon the ground that the contract, as set forth in the Exhibits contained in the Record, was void for want of mutuality. The Honorable Judge held, however, that while the letters themselves were insufficient to form a binding contract, under the allegations of the complaint it was proper to introduce other evidence which, taken in connection with these letters, might constitute a contract. The case was therefore tried to the jury, and after a trial extending over a period of six days a verdict was rendered in favor of the defendant.

For the reason, therefore, that this question, as to whether or not the letters contained in the record constituted a contract, was fully considered by the Court below, that counsel for defendants thoroughly recognized the importance of that question, that it was not urged by counsel for plaintiff in error, and was only indirectly and remotely before this Honorable Court, the defendants in error pray that a rehearing may be granted, and submit the following argument and authority in support of their petition.

II.

It is stated by this Court that the correspondence contained in the record made it binding upon the defendant to furnish plaintiff "a proportion of the freight pro rata

with the other carriers according to carrying capacity." Grant this to be true. The question then arises, Was Roberts bound to do anything? It is a well known principle that a contract in order to be binding upon one of the parties must be binding upon both. Could Roberts have been compelled by the defendants to haul 100 tons per month, or even one ton, at the price stated, or at any price? The first letter of Roberts was but a proposition to have ready a sufficient number of teams to haul 100 tons of freight per month, provided defendants would agree to give him that amount. Defendants replied by saying that they could not agree to any specified amount, but agreeing to pay the rate of four and one-half cents per pound. To this Roberts replied that he accepted the rate, without any agreements whatever upon his part to do anything. Roberts was not bound by this acceptance to furnish the number of teams stated in his first letter, as that proposal was conditioned upon his being insured one hundred tons of freight per month.. This leaves a contract compelling defendants to pay Roberts 4½ cents per pound for his pro rata of freight, providing he decides to haul that amount, or any amount, and we contend that it is therefore void for want of mutuality.

There are many cases holding that contracts for future sales, where the amount is dependent alone upon the wish or desire of the buyer, are void, but in all cases where the amount to be purchased can be determined, for instance where the buyer agrees to purchase of the seller all the

goods needed in his business for a stated period, such contracts are upheld. It must be borne in mind, however, that in all these cases the seller absolutely agrees to furnish the amount desired.

In the case of Harvester King Co. vs. Mitchell, Lewis & Staver, 89 Fed. 173, it is held that a contract by which one party agrees to order from the other all of certain machines and extras required to supply the trade of a certain territory, which the second party agrees to furnish "without any liability for damages for failure from any cause to furnish such machines and extras" creates no obligation on the part of the second party, and is without mutuality. The court says:

"The stipulation against liability on plaintiff's part for damages for its failure from any cause to comply with the contract in effect releases the plaintiff from any obligation to perform its agreements. Where there is no liability there is no obligation, and without an obligation to perform on the part of one of the parties, neither is bound.

We believe that the principle above announced applies to the case at bar. There was no obligation on the part of Roberts, and therefore no liability on the part of the defendants. Suppose, for instance, that the prices for hauling freight instead of dropping to one or two cents had advanced to ten cents per pound. Can it be said for a moment that the defendants could have compelled Roberts under their contract with him to have hauled any amount of freight at the agreed price of four and one-half cents?

There can be no question whatever but that Roberts could have said: "I have no teams ready to haul ten tons (or whatever the amount might have been). I did not agree to furnish any stated number of teams, for you did not agree to give me any certain quantity of freight."

We will concede that there might have been oral admissions on the part of plaintiff and defendants, subsequent acts of acquiescence, ratification, etc., which, taken in connection with the correspondence referred to above, might have constituted a binding contract. All such evidence, however, was submitted to the jury, and it found in favor of the defendants. It was shown that Roberts did not have a sufficient number of teams to have hauled one hundred tons per month, and there was evidence that he had no teams of his own there.

III.

In support of the principle above contended for defendants in error also cite the following cases:

In the case of Wilkinson vs. Heavenrich, 58 Mich. 574 (55 Am. Rep. 708), it is held that a contract for service for more than a year, signed only by the employer, is void for want of mutuality. The court says:

"It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding must be mutual; and this is especially so when the

consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.'' Many cases are cited by the Court in support of this principle.

In the case of Olney vs. Howe, 89 Ill. 557, it is held: ''To make a valid executory contract there must at least be two parties capable of contracting, and both must be bound. Promises must be concurrent and obligatory on both at the same time to render the promise of either binding.'' The same doctrine is found in Morrow vs. Express Co., 28 S. W. 998.

In the case of Chicago & Great Eastern Railway Co. vs. Francis B. Dane, 43 N. Y. 240, where the defendant offered by letter to receive from the plaintiff and transport from New York to Chicago railroad iron not to exceed a certain number of tons during certain specified months, at a specified rate per ton, and the plaintiff answered accepting the proposal, but not agreeing to deliver any iron for such transportation, it was held that there was no valid contract binding on either party.

The case of Vogel et al. vs. Pekoc (Ill. 1895) reported in 42 N. E. 386, is also in point, as is also the case of Stensgaard vs. Smith (Minn. 1890) reported in 44 N. W. 668.

In the case of Utica & Schenectady Ry. Co. vs. Brinckerhoff, 34 Am. Dec. 220, plaintiff alleged an agreement in writing, whereby it was stipulated that if plaintiffs would locate their road on a certain street, and should require certain lands for that purpose, the defendant would pay appraised value of the land, in consideration to be derived from such location, and the declaration further alleged that the plaintiffs at defendant's request had promised to perform same on their part and that defendant had

promised same on her part, and that though the plaintiffs had performed the agreement by locating the road, defendant had not performed the agreement on her part. The court held that the promise of each must be concurrent and obligatory at the same time to render it binding; that, where there is no promise on the part of plaintiff as consideration for defendant's promise, and it is merely averred that defendants' promise is acted upon it cannot be enforced. The same doctrine is laid down in the case of American Cotton Oil Co. vs. Kirk, 68 Fed. 791.

In the case of Blanchard vs. Detroit & Lansing Lake Michigan Ry. Co., 31 Mich. 43, plaintiff conveyed to defendants a strip of land to be used as a right of way, and defendants as part consideration therefor agreed to erect a depot on the land conveyed and to stop a certain number of trains there daily. Defendants failed to build the depot or stop the trains as required, and plaintiff brought action for specific performance or for damages. The court in the opinion uses the following language:

"The courts do not assume to make contracts for parties; neither do they undertake to supply material ingredients which the parties contracting omit to mention, and which cannot be legitimately considered as having been within their mutual contemplation, and where the party to perform is left by the agreement with an absolute discretion respecting material and substantial details, and these are therefore indeterminate and unincorporated until by his election they are developed, identified and fixed as constituents of the transaction, the court cannot substitute its own discretion, and so by its own act perfect and round out the contract."

The case of Davie vs. Lumberman's Mine Co., 93 Mich. 491 (53 N. W. 625), also sustains the principle we are contending for. In that case plaintiffs made an agreement with defendant to work in its mine and to receive a dollar and a half per ton for all the ore they produced, as long as

they could make it pay. Plaintiffs were to put in the skid roads for hoisting the ore, etc. They entered upon the work and defendant refused to allow them to continue. Held, that an action for breach of contract could not lie. The court said:

"Contracts cannot arise where there is no mutuality; nor can they arise from the action of one party alone, where the other has no power to prevent his action."

The decision in the preceding case is approved and followed in the case of Missouri K. & T. Co. vs. Bagley, 56 Pac. 759, where one H. & Co. of Missouri entered into a contract with a railroad company wherein it was agreed that if H. & Co. would accept certain offers received by them from persons in Mexico for the purchase of corn, the railroad company would transport the same at a certain rate within a definite time. Held, that the contract was not binding upon the ralroad company for want of mutuality, in that H. & Co. were not obliged to ship over said line of railroad.

A contract which imposes no obligation upon one of the parties is void for want of mutuality. Allen vs. Rouse H. & Co., 78 Ill. App. 69.

A reply to an offer for a sale of lumber on conditions indicated by a prior conversation, which falls short or goes beyond such conditions, is no acceptance of the offer. Davenport vs. Newton, 71 Vt. 11 (42 Atl. 1087.)

An agreement by a manufacturer to ship goods and fill orders to be taken by a certain person is not binding for lack of mutuality in the absence of any promise to procure the orders. Wagner vs. Meakin, 92 Fed. Rep. 76.

The case of Clark vs. Great Northern Railway, 81 Fed. 282, also very strongly supports our contention. In that case the court uses the following language:

"The fundamentals of a legal contract are parties, subject matter, assent and consideration. There can be no contract if any of these elements is lacking, and to enforce a contract by legal proceedings it is necessary to set forth the contract with precision and certainty, so as to show a complete contract. . . . And a contract to be enforceable must have the quality of mutuality, for one or several persons who could not be compelled to perform a promise may not compel others to fulfill a promise dependent upon such non-enforceable promise."

Defendants in error therefore contend that the submission to the jury of defendants' exhibit No. 2, as throwing light upon the question whether a contract had been entered into, was not error.

Respectfully submitted,

JOHN P. HARTMAN,
Attorney for Defendants in Error.

I hereby certify that the foregoing petition for a rehearing is, in my opinion, well founded in point of law.

JOHN P. HARTMAN,
Attorney for Defendants in Error.

No. 842

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

FRYE-BRUHN COMPANY (a Corporation),
Appellant,

vs.

HERMAN MEYER,
Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

The Filmer Brothers Co. Print, 424 Sansome St., S. F.

INDEX.

In the United States District Court, in and for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),

Plaintiff,

vs.

HERMAN MEYER,

Defendant.

Marshal's Return.

United States,
District of Alaska,
Division No. 1. } ss.

I, James M. Shoup, United States marshal, in and for the District of Alaska, Division No. 1, do hereby certify that the original citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, issued out of the above-entitled cause, appealing from an order modifying a temporary restraining order issued out of said cause in the said court, which said modification was to the extent of not restraining the firm of Maloney & Cobb, in drawing down one thousand ($1,000) dollars of moneys in the hands of the clerk of this court, came into my possession on the 28th day of April, 1902, and that I served the same upon Herman Meyer, the above-named defendant, personally, on the 28th day of May, 1902, by leaving with him personally at Skagway, Alaska, a full,

true and correct copy of the same, certified to be such by the clerk of the above-entitled court.

JAMES M. SHOUP,
United States Marshal.
By John W. Snook,
Deputy.

In the United States of America,
District of Alaska. } ss.

I, W. J. Hills, clerk of the United States District Court in and for the District of Alaska, Division No. 1, at Juneau, Alaska, do hereby certify that the return of the United States marshal, James M. Shoup, by his deputy, John W. Snook, of the service of the citation on appeal to the United States Circuit Court, in and for the Ninth Circuit, upon Herman Meyer, personally, in the case of Frye-Bruhn & Co., a corporation, plaintiff, vs. Herman Meyer, No. 154, of this court, and hereto attached, was this day filed with me as such clerk of said court, and in obedience to the citation on appeal to the said United States Circuit Court of Appeals, I hereby certify to the same as part of the record of said cause, which has been filed in my office subsequent to the certifying of said record to the Circuit Court of Appeals, and the said return, together with the other record heretofore forwarded to the clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, constitute a full, complete and entire record of said cause in my office.

Dated this 31st day of May, 1902.

[Seal]

W. J. HILLS,
Clerk.

[Endorsed]: No. 842. In the United States District Court, for District of Alaska, Division No. 1. Frye-Bruhn Company, Plaintiff, vs. Herman Meyer, Defendant. Marshal's Return. Filed May 31, 1902. W. J. Hills, Clerk. By ———————— Deputy. Winn & Shackleford, Attorneys for Plaintiff, Juneau, Alaska.

Filed June 9, 1902. F. D. Monckton, Clerk, United States Circuit Court of Appeals, for the Ninth Circuit.

In the United States District Court, for the District of Alaska, Division No. 1, at Skaguay.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Orders and Pleas in Said Cause Constituting Record.

Be it remembered that on March 21st, 1902, the following bill of complaint was filed in the above and foregoing cause, in words and figures, to wit:

In the United States District Court, in and for the District of Alaska, Division No. 1, At Skaguay.

FREYE-BRUHN COMPANY, (a Corporation),

Plaintiff,

vs.

HERMAN MEYER,

Defendant.

No. ——.

Bill of Complaint.

To the Honorable MELVILLE C. BROWN, Judge of the above-entitled Court:

Comes now the plaintiff, and complaining of the above-named defendant, for cause of action alleges:

I.

That at all the times mentioned herein the above-named plaintiff, Frye-Bruhn Company, has been and now is a corporation, duly organized under the laws of the State of Washington, and doing business in the District of Alaska.

II.

That on June 26th, 1899, in the Superior Court of the State of Washington, in and for the county of King, the same being, and now is, a court of record and general jurisdiction, in a suit wherein Charles H. Frye was plaintiff, and the above-named Herman Meyer, defendant, the said Charles H. Frye, plaintiff, recovered a judgment

against the said Herman Meyer, defendant in the sum of $3,140.10, and costs amounting to $26, together with interest thereon at the rate of ten per cent per annum from June 28th, 1899, which judgment is in words and figures as follows, to wit:

"*In the Superior Court of the State of Washington, in and for King County.*

CHARLES H. FRYE,
Plaintiff,
vs.
HERMAN MEYER,
Defendant.
No. ——

Judgment.

This cause having come on for trial on this 27th day of June, 1899, before the Court, without a jury, (a jury having been waived by oral consent of the respective parties in open court), and entered in the minutes of the court, Messrs. Piles, Donoworth & Howe, appearing for the plaintiff, and Messrs, Ballenger, Ronald & Battle, appearing for the defendant, whereupon the cause proceeded to trial. Upon introduction of evidence on behalf of the plaintiff, the demurrer of the plaintiff having been sustained to the affirmative defenses set forth in defendant's answer, and the defendant having announced that he did not desire to further plead, but stood upon the said affirmative defenses, and having failed to offer any evidence in his behalf, the Court made the findings of fact and conclusions of law, which are now on file in this court and cause, and from which it appears among other

things, that the defendant, Herman Meyer, is indebted to the plaintiff, Charles H. Frye, in the sum of three thousand one hundred and forty and 10-100 ($3,140.10), dollars, on the note sued upon in this action, and that judgment be entered in favor of the plaintiff for said sum and interest; and the Court being now fully advised in the premises, it is ordered, considered, and adjudged, by the Court that the plaintiff, Charles H. Frye, do have and recover of and from the defendant, Herman Meyer, the sum of three thousand one hundred and forty and 10-100 dollars, together with interest thereon at the legal rate from this date until paid, including the costs and disbursements of this action, to be taxed and allowed by the clerk, in the sum of ———— dollars, and that execution issue therefor. To the foregoing judgment, defendant excepts.

June 28th, 1899.

E. D. BENSON,
Judge.

O. K. Ballenger, R. B. etc.

Filed June 28th, 1899. George M. Holloway, Clerk. T. H. P."

Which said judgment was duly given and made, and the same is hereby referred to and made a part of this bill of complaint.

III.

That afterward, to wit, on the 26th day of January, 1900, an execution was duly issued out of the said Superior Court in and for the county of King, State of Washington, in said cause, directed to the sheriff of said county of King, directing said sheriff to seize and take into

execution property of the said Herman Meyer, sufficient to pay said judgment of $3,140.10, together with the costs which had theretofore been taxed in the sum of $26; which said execution was, on the 26th day of January 1900, duly and regularly returned, unsatisfied, and no property found; that the legal rate of interest is now and at all times mentioned herein, in the State of Washington, ten per cent per annum.

IV.

That on the 27th day of January, 1900, by an instrument in writing duly executed, signed, delivered, and witnessed, the said Charles H. Frye, for a valuable consideration, duly, regularly and legally assigned, and set over unto the plaintiff herein, Frye-Bruhn Company, a corporation, said judgment, and the said Frye-Bruhn Company has been ever since said date, and is now, the owner and holder of said judgment, and that no property of the said defendant, Herman Meyer, can be found to satisfy the same or any part thereof.

V.

That on the —— day of ————, 1899, the said Herman Meyer duly and regularly commenced an action in the United States District Court, in and for the District of Alaska, in that part of said District, which is now Division No. 1, which said cause was entitled "Herman Meyer, Complainant, vs. Frye-Bruhn Company (a Corporation), Defendant," and numbered 849; and that thereafter such proceedings were had, that on the 21st day of March, 1902, in this court the said Herman Meyer recovered a judgment against the defendant herein for the sum of 45 per cent of $6,295, after paying the costs of

said action No. 849; which said judgment is in writing, and duly signed and entered by this Court, and is now of record in said cause No. 849; the said plaintiff having appeared in said cause and contested the same, and said judgment is now a valid, subsisting, and outstanding judgment against the said Frye-Bruhn Company, the plaintiff in this action, and is held and owned by the said Herman Meyer, defendant herein; that there is money in the hands of the clerk of this court, paid to him by Frye-Bruhn Company, which is ordered by this Court to be applied on said judgment, and is sufficient in amount to pay the same.

VI.

That the said United States District Court, in and for the District of Alaska, in which said court the last-mentioned judgment was rendered, is a court of record and general jurisdiction, and is the same court as the United States District Court, in and for the District of Alaska, Division No. 1, in which this action of Frye-Bruhn Company vs. Herman Meyer is now being prosecuted.

VII.

That this plaintiff believes and alleges the fact to be: that the plaintiff herein is now and will be in the future unable to collect the said judgment, recovered in the Superior Court of King County, State of Washington, against the said Herman Meyer; that the said Herman Meyer is either insolvent and has no property out of which to satisfy said judgment, or has his property secreted and in the name of other persons, in order to defeat the rights of the plaintiff. That the plaintiff herein has made diligent search for property of the said Her-

man Meyer, out of which to satisfy said judgment so held by plaintiff, and is by said search, and invoking the aid of proper court officials in the premises, unable to find any property in the State of Washington or in the jurisdiction of this Court out of which to satisfy the said judgment, or any part thereof.

That the plaintiff herein has no remedy at law in the premises, and by which his rights may be protected as set forth herein, and is able and has property to respond to said judgment of Herman Meyer obtained in this Court, and out of which said judgment may be satisfied. That the said Herman Meyer has threatened, and will, unless restrained by this Court, have an execution issued out of said cause No. 849 in this court, and the property of this plaintiff levied upon to satisfy said judgment and costs, to the great and irreparable damage of this plaintiff, and will leave plaintiff without any remedy for the collection of its said judgment recovered in the Superior Court in the State of Washington as aforesaid; or the said Herman Meyer will, and has threatened to assign his said judgment in Cause 849, to other persons in order to defeat the claim of the plaintiff herein, and will commit all or some of said deeds and actions complained of herein, unless restrained by an order of this Court, until the plaintiff's rights are established herein so that the judgment recovered by this plaintiff in the Superior Court of the State of Washington, in and for the County of King, against the said Herman Meyer for the sum of $3,140.10 and costs and interest therein may be an offset to the judgment recovered by the said Herman Meyer in this Court in Cause 849, or

that one judgment may be applied as payment, as far as the same will reach, upon the other.

That plaintiff believes that an emergency exists for the granting of a temporary restraining order herein without notice; that should notice be served herein before a hearing could be had thereon, the said Herman Meyer could and would have committed the wrongs complained of herein and thus defeat the rights of the plaintiff in the premises. Wherefore plaintiff prays for judgment against the defendant herein:

1. That a restraining order and temporary injunction issue immediately herein restraining the said Herman Meyer, during the pendency of this action, from doing the acts or any of the acts complained of herein, and from assigning the judgment to any person or persons whomsoever so recovered by him in said Cause No. 849 in this court, or having an execution issued out of this court in said cause and upon said judgment.

2. That upon a final hearing of this cause the said judgment recovered by this plaintiff against the said Herman Meyer in the Superior Court of the County of King, State of Washington, be established and affirmed, and that this plaintiff have judgment therein against the said defendant for the sum of $3,140.10, together with costs amounting to the sum of $26, and with interest on said judgment at the rate of ten per cent per annum from June 28th, 1899, together with its costs expended herein and disbursements; and that one of the judgments herein be offset against the other or payment of one be offset against the other; and if any deficiency in favor of plaintiff, that it have judgment for the same and costs of this

action; and that the clerk of this court during the pendency of this action be restrained or ordered by this Honorable Court to pay no money out which is in his hands in said Cause Number 849, of Herman Meyer against Frye-Bruhn Company, a corporation, on the judgment recovered in said cause or otherwise, and for such other and further relief as to this Court may seem just and equitable in the premises.

WINN & SHACKLEFORD,
Attorneys for Plaintiff.

United States of America,
District of Alaska. } ss.

M. G. Rogers, being first duly sworn, on oath deposes and says:

I am the agent and manager at Juneau, Alaska, of Frye-Bruhn Company, a corporation; that I have heard read the foregoing bill of complaint, know the contents thereof, and that the same is true.

M. G. ROGERS.

Subscribed and sworn to before me this 17th day of March, 1902.

JNO. R. WINN,
Notary Public, Alaska.

[Endorsed]: No. 154. In the United States District Court, for the District of Alaska, Division No. 1. Frye-Bruhn Company, a Corporation, vs. Herman Meyer. Bill of Complaint. Filed March 21, 1902. W. J. Hills, Clerk. Winn & Shackleford, Attorneys for Plaintiff.

And on the same day, there was filed in said cause the affidavit of John R. Winn, which is in words and figures following to wit:

In the United States District Court in and for the District of Alaska, Division No. 1, at Skaguay.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Affidavit of Jno. R. Winn.

United States of America,
District of Alaska. } ss.

Jno. R. Winn, being first duly sworn, on oath deposes and says: That I am now and for some time past have been attorney in Alaska for Frye-Bruhn Company, the above-named corporation, and that I was attorney for the said Frye-Bruhn Company in action which has just been prosecuted to a final determination in this court and entitled "Herman Meyer vs. Frye-Bruhn Company (a corporation)," and numbered 849 in this court; that in said cause last mentioned a decree has been entered and judgment allowing the said Herman Meyer, after costs are paid, 45 per cent of $6,295, which fund arose from the sale of property and rents thereof which the said Frye-Bruhn Company, a corporation, claimed as its prop-

erty, but which was adjudged to be a partnership property of the above plaintiff and defendant after the trial of said action numbered 849 in this court. This affiant further states that there is money enough, to wit, the sum of $3,857.50 in the hands of the clerk of this Court, to pay the said Herman Meyer his 45 per cent of said amount mentioned herein. That the said sum of $3,857.50, was derived from the sale of the said property mentioned herein, and was paid by said Frye-Bruhn Company into this court under an order, to await the outcome of this suit; which was property that the said Frye-Bruhn Company had in its possession before the commencement of said action number 849 in this court, and which the said Frye-Bruhn Company claimed as its property, and which it had been in possession of since and before the commencement of said action, and has remained in possession thereof, claiming the same as its property until the same was adjudged to be the property of Frye-Bruhn & Company, and was sold by an order of this Court and the funds paid into this court, as aforesaid, to abide the result of said action commenced by the said Herman Meyer, as aforesaid.

Affiant has read the complaint herein and from personal knowledge knows part of the facts therein stated to be true, and from record evidence, knows the remaining facts to be true.

JNO. R. WINN.

Subscribed and sworn to before me this 21st day of March, 1902.

[L. S.] J. J. CLARKE,
Deputy Clerk.

[Endorsed]: No. 154. In the United States District Court, District of Alaska, Division No. 1, Frye-Bruhn Company, Affidavit. Filed March 21, 1902. W. J. Hills, Clerk. Winn & Shackleford, Attorneys for Plaintiff.

And be it further remembered that thereafter and upon the filing and consideration of the foregoing papers, the Court made its order herein in words and figures as follows:

In the United States District Court, in and for the District of Alaska, Division No. 1, at Skaguay.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Restraining Order.

Plaintiff in the above-entitled cause having commenced an action in the above-entitled court against the above-named defendant, and having prayed for an injunction pending said action against the defendant, requiring him to refrain from certain acts in said complaint and hereinafter more particularly mentioned. On reading the said complaint in said action, duly verified, and it satisfactorily appearing to me therefrom that it is a proper case for an injunction pending an or-

der to show cause, and that sufficient grounds exist therefor, and an undertaking having been given, approved and as required by me in the sum of five hundred dollars;

It is therefore ordered by me, the Judge of the above-entitled court, that you, the said Herman Meyer, show cause before this Court at Skaguay, Alaska, on the 10th day of April, 1902, at two o'clock P. M. of said day, why you should not be restrained, and your attorneys and agents, and all others acting in aid or assistance of you, from certain acts and things complained of in the bill of complaint on file herein; and until such time you and each of you are hereby restrained and enjoined from assigning, selling, or negotiating or collecting any money thereon from the clerk of this Court or anyone, on that certain judgment or any interest therein, rendered and entered on the 21st day of March, 1902, in that certain cause in this court, wherein Herman Meyer is complainant and Frye-Bruhn Company, a corporation, is defendant, and numbered in this court 849, which said judgment is in favor of the said Herman Meyer and against the said Frye-Bruhn Company, a corporation; and all proceedings under said judgment are hereby stayed and the clerk of this Court is ordered not to pay out any money upon said judgment in said cause, but to hold any money and retain the same within his possession which he may have in said cause numbered 849, until the further order of this Court.

Done in open court this 21st day of March, 1902.

M. C. BROWN,
Judge.

[Endorsed]: No. 154. In the United States District Court in the District of Alaska, Division No. 1. Frye-Bruhn Company (a Corporation), Plaintiff, vs. Herman Meyer, Defendant. Restraining Order. Filed March 21, 1902. W. J. Hills, Clerk. Winn & Shackleford, Attorneys for Plaintiff.

In the United States District Court in and for the District of Alaska, Division No. 1. at Skaguay.

FRYE-BRUHN COMPANY (a Corporation), Plaintiff,

vs.

HERMAN MEYER, Defendant.

No. ——.

Undertaking.

Know all men by these presents, that we, Frye-Bruhn Company, a corporation, as principal, and C. B. Haraden as surety, all of Skaguay, Alaska, are held and firmly bound unto the above-named defendant Herman Meyer in the sum of five hundred dollars, for which sum payment well and truly to be made we bind ourselves and each of ourselves, our heirs, executors, administrators and assigns firmly by these presents.

The condition of the above obligation is such that:

Whereas, the above-named plaintiff has commenced an action in the above-entitled court, (or is about to commence the same), against the above-named defendant,

and is about to apply for an injunction in said action against the defendant, enjoining and restraining him from the commission of certain acts as in the complaint in the said action is more particularly set forth and described.

Now therefore, we the undersigned, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five hundred dollars, and promise to the effect that in case said injunction shall issue, the said plaintiff will pay to the said party enjoined such damages not exceeding five hundred dollars and all costs and disbursements that may be decreed to the defendant, and that he may sustain by reason of the injunction if the same be wrongful or without sufficient cause.

Witness our hands and seals this 22d day of November, A. D., 1901.

FRYE-BRUHN COMPANY,
Principal.

J. J. DALY,
Agent.

C. B. HARADEN,
Surety.

United States of America,
District of Alaska. } ss.

C. B. Haraden, being first duly sworn, on oath deposes and says: I am the sureties mentioned in the foregoing undertaking, and am a resident of Skaguay, Alaska, and am worth the sum of one thousand dollars over and above all my just debts and liabilities and property exempt from execution; and that I am not an attorney at law, clerk of a court, or United States marshal or an officer of any court whatsoever.

C. B. HARADEN.

Subscribed and sworn to before me this 21st day of March, 1901.

[L. S.] I. N. WILCOXEN,
Notary Public for Alaska.

Approved March 21, 1901.

W. H. HILLS,
Clerk.

[Endorsed]: No.154. In the United States District Court in the District of Alaska, Division No. 1. Frye-Bruhn Company (a Corporation), Plaintiff, vs. Herman Meyer, Defendant. Undertaking. Filed March 21, 1902. W. J. Hills, Clerk. Winn & Shackleford, Attorneys for Plaintiff.

Thereafter, and to wit, on the 11th day of April, 1902, the following motion and affidavit were filed in said cause, in words and figures as follows:

In the United States District Court, for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY,
Plaintiff,
vs.
HERMAN MEYER,
Defendant,
No. 154.

Motion to Modify Restraining Order.

Now comes Malony & Cobb in their own behalf and move the Court to modify the restraining order heretofore made herein to the exent of one thousand dollars ($1,000), and shows that they have a lien upon the sum of money the payment of which is restrained, superior to any claim against the same in the part of plaintiff, as fully appears from the files in said cause and the affidavit of J. H. Cobb, appended hereto and made a part hereof.

They further show that said restraining order was improvidently issued in this: That it appears from the complaint herein that this Court has no jurisdiction as a court of equity of the cause of action sued on; and that complainant has no such interest in or lien upon the fund in court, the payment of which is restrained, as to

entitle it to the injunction prayed for, or to any order or relief affecting the same.

MALONY & COBB,
For Themselves.

[Endorsed]: No. 154. District Court for Alaska, Division No. 1. Frye-Bruhn Company vs. Herman Meyer. Motion of Malony & Cobb. Filed April 11, 1902. W. J. Hills, Clerk.

United States of America,
District of Alaska. } ss.

J. H. Cobb, being duly sworn on oath, says: That he is a member of the firm of Malony & Cobb, members of the bar of this court, and that said firm have been attorneys for the plaintiff in the case of Herman Meyer vs. Frye-Bruhn Company since early in the year 1899; that it was especially agreed and understood by and between them and the said Meyer that their compensation for services in said cause (except some small payments to cover actual expenses) should be paid out of the fund recovered therein and secured in said cause to the plaintiff; that said compensation was to be one thousand dollars ($1,000) and an additional amount dependent upon certain contingencies; that on and pursuant to said employment there is now due the said Malony & Cobb the sum of one thousand dollars, payable primarily out of the fund in the registry of the Court in said cause and upon which they have a lien therefore.

J. H. COBB.

Subscribed and sworn to before me this 11th day of April, 1902.

[L. S.] W. J. HILLS,
Clerk.

Be it further remembered, that thereafter and on the 12th day of April, 1902, the objection of attorneys for the plaintiff herein was filed in words and figures as follows:

United States District Court for Alaska, Division No. 1, Skaguay.

FRYE-BRUHN COMPANY, Plaintiff,

vs.

HERMAN MEYER, Defendant,

Objection to Motion to Modify Restraining Order.

Comes now the above plaintiff and appears specially herein in the matter of the application of Malony & Cobb for modification of the temporary restraining order granted herein, and objects to consideration of said application for the reason the Court has no jurisdiction to act in said matter and upon said application.

WINN & SHACKLEFORD,
Attorneys for Plaintiff.

[Endorsed]: 154. Frye-Bruhn Company, Plaintiff, vs. Herman Meyer, Defendant. Objection. Filed April 12, 1902. W. J. Hills, Clerk. Winn & Shackleford, Attorneys, Plaintiff.

Be it further remembered that thereafter, and to wit, on the 15th day of April, 1902, the Court made its certain order in said cause, in words and figures as folows:

FRYE-BRUHN COMPANY,
vs.
HERMAN MEYER.

Order Modifying Restraining Order.

On this day this cause came on to be heard upon the motion of Malony & Cobb to modify the restraining order heretofore issued herein, to the extent of permitting them to withdraw the sum of one thousand ($1,000) dollars from the fund in the registry of the Court, the payment of which by the clerk was restrained herein, and the Court having heard said motion, and the argument of counsel thereon, and being fully advised in the premises, it is therefore considered by the Court and it is so ordered, adjudged, and decreed, that the restraining order heretofore issued herein be modified to the extent of the interest of the said Malony & Cobb in the fund to be distributed, to wit: The sum of one thousand ($1,000) dollars out of the fund decreed to Herman Meyer in the cause of Herman Meyer vs. Frye-Bruhn Co. No. 849.

Dated April 15th, 1902.

M. C. BROWN,
Judge.

To which order and ruling of the Court, plaintiff by counsel excepts; and plaintiff is given twenty days in which to present its bill of exceptions and perfect appeal herein.

[Endorsed]: No. 154. In the United States District Court for Alaska, Division No. 1. Herman Meyer vs. Frye-Bruhn Company. Order. Filed April 15, 1902. W. J. Hills, Clerk.

And be it further remembered, that thereafter the following pleas and orders were made and filed in said cause, to wit:

In the United States District Court for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,

vs.

HERMAN MEYER,
Defendant.

Affidavit of J. J. Daly.

United States of America,
District of Alaska. } ss.

J. J. Daly being first duly sworn on oath deposes and says: That I am now, and have been for some time past

connected in business with Frye-Bruhn Company, the above-named corporation, and know that the judgment which Charles H. Frye recovered against Herman Meyer in the Superior Court of King County, State of Washington, for $3,140.10, was obtained on an indebtedness due Frye-Bruhn Company, but was held in trust by Charles H. Frye for the said Frye-Bruhn Company, said Charles H. Frye being at all times manager and president of said company. That the said judgment recovered for said amount is the same judgment that is set up in the above-entitled action now pending in this court, and is for an indebtedness that existed before the commencement of the action of Herman Meyer against Frye-Bruhn Company, in which last-named case a decision has just been rendered in this Court.

J. J. DALY.

Subscribed and sworn to before me this 14th day of April, 1902.

JNO. R. WINN,
Notary Public.

[Endorsed]: No. 154. District Court of Alaska, Division No. 1. Frye-Bruhn Company, vs. Herman Meyer. Affidavit. Filed April 15, 1902. W. J. Hills, Clerk.

In the United States District Court, for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Motion and Application.

Comes now the above plaintiff by its attorneys, Winn & Shackleford, upon the ruling of the Court made herein in the matter of the application of Malony & Cobb to modify the temporary restraining order heretofore granted in said cause, and moves the Court to allow the restraining order heretofore on the —— day of March, 1902, granted in the above-entitled cause, and restraining the above-named defendant and his attorneys from doing certain matters and things therein set out, to remain in force and effect until the 5th day of May, 1902, or until a bill of exceptions is settled or an appeal perfected from the ruling and order made by this Honorable Court, and the modifying of said temporary restraining order upon the motion of the said Malony & Cobb.

And said plaintiff further applies to this Honorable Court for thirty days' time from the 15th day of April, 1902, in which to prepare a bill of exceptions and perfect the appeal from the ruling and order of the Court in

modifying said temporary restraining order on said motion of Malony & Cobb, made and filed herein as aforesaid.

WINN & SHACKLEFORD,
Attorneys for Plaintiff.

[Endorsed]: No. 154. District Court for Alaska, Division No. 1. Frye-Bruhn Company, vs. Herman Meyer. Motion and Application. Filed April 16, 1902. W. J. Hills, Clerk.

Whereupon, the following order was entered, to wit:

In the United States District Court, for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Order Granting Time to Present Bill of Exceptions.

Upon motion and application of the above-named plaintiff by its attorneys Winn and Shackleford, for time in which to settle the bill of exceptions and perfect an appeal from the order of the Court made herein on motion of Malony & Cobb to modify the temporary restraining order heretofore granted in the above-entitled cause

against the above-named defendant, his attorneys, etc., and on application by said plaintiff to restrain said temporary restraining order in force and effect, pending the time in which to perfect the appeal from said ruling of the Court:

It is ordered that the plaintiff herein have twenty days' time from the fifteenth day of April, 1902, in which to present to this Court, or the judge thereof, after adjournment of term, its bill of exceptions, and in perfecting said appeal; and that during said time, or until the 5th day of May, 1902, it is hereby ordered that the temporary restraining order heretofore on the 21st day of March, 1902, granted in the above-entitled cause, remain in full force, effect, and virtue against the parties set out, mentioned, and described therein.

Done in open court this 14 day of April, 1902.

M. C. BROWN,

Judge.

[Endorsed]: No. 154. District Court for Alaska, Division No. 1. Frye-Bruhn Company, vs. Herman Meyer. Order. Filed April 16, 1902. W. J. Hills, Clerk.

Be it further remembered, that thereafter, and to wit, on the 25th day of April, 1902, the plaintiff presented its petition on appeal in the words and figures following:

In the United States District Court, for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation), Plaintiff,
vs.
HERMAN MEYER, Defendant.
No. 154.

Petition for Allowance of Appeal, etc.

The above-named plaintiff in the above-entitled cause, the Frye-Bruhn Company, a corporation, conceiving itself aggreived by the interlocutory order, or order made herein on the 15th day of April, 1902, wherein and whereby it was ordered and decreed, that the temporary injunction or restraining order made in the above-entitled cause on application of above-named defendant, on the 21st day of March, 1902, among other things should be modified so as to allow or not to enjoin or restrain Malony & Cobb, attorneys, from withdrawing or taking out of the funds or money in the hands of the clerk of this Court paid therein upon a final decree entered in a cause in this Court wherein the above-named defendant was plaintiff, and above-named plaintiff, defendant, and in

which said last-mentioned cause, Malony & Cobb were attorneys for the plaintiff therein, Herman Meyer, and the amount which the said Malony & Cobb claimed in said cause, as aforesaid; and the extent of the modification of said temporary restraining order is the sum of one thousand dollars ($1,000), do hereby appeal to the United States *Circuit Court, for the Ninth Circuit*, at San Francisco, California, from said order so made, modifying said temporary injunction or restraining order, for the reason set forth in the assignment of errors, which is filed herewith; and said plaintiff prays that this, their petition for their said appeal, may be allowed, and also that an order may be made fixing the amount of security which plaintiff shall give and furnish upon such appeal; and upon the giving of such security, and the retention of the said one thousand dollars ($1,000), in the hands of this Court, to abide the result of such appeal; that the temporary restraining order heretofore granted in favor of plaintiff and against the above-named defendant on the 21st day of March, 1902, remain in full force and effect pending this appeal in so far as the same is modified, or not restraining Malony & Cobb from withdrawing from the hands of the clerk of this Court the said $1,000, and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California.

WINN & SHACKLEFORD,
Attorneys for Plaintiff.

Order.

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Done in open court this 25th day of April, 1902.

M. C. BROWN,

Judge of the United States District Court for the District of Alaska, Division No. 1.

[Endorsed]: No. 154. In the United States District Court, for District of Alaska. Frye-Bruhn Company, Plaintiff, vs. Herman Meyer, Defendant. Petition for Appeal. Filed April 25, 1902. W. J. Hills, Clerk. Winn & Shackleford, Attorneys for Plaintiff. Juneau, Alaska.

In the United States District Court, in and for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),

Plaintiff,

vs.

HERMAN MEYER,

Defendant.

No. 154.

Assignment of Errors.

Comes now the above-named plaintiff and files the following assignment of error upon which it will rely on appeal herein:

First. That the Court erred in overruling plaintiff's objections filed herein to the motion filed by Malony & Cobb to modify the restraining order made and entered by this Court on the 21st day of March, 1902; and erred in the consideration of said motion of Malony & Cobb, over the objections filed herein by said plaintiff as aforesaid.

Second. The Court erred in granting the order to modify the injunction granted herein on the 21st day of March, 1902, so that the same would not restrain Malony & Cobb from withdrawing from the funds in Court, one thousand dollars ($1,000), which said order modifying said injunction or restraining order was made and entered herein on the 15th day of April, 1902, and on motion of the said Malony & Cobb based upon the affidavit of J. H. Cobb, and the files in this cause.

WINN & SHACKLEFORD,
Attorneys for Plaintiff.

[Endorsed]: No. 154. In the United States District Court for District of Alaska. Frye-Bruhn Company, Plaintiff vs. Herman Meyer, Defendant. Assignment of Errors. Filed April 25, 1902. W. J. Hills, Clerk. Winn & Shackleford, Attorneys for Plaintiff. Juneau, Alaska.

In the United States District Court, for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Order Fixing Amount of Bond.

Plaintiff herein having this day filed its petition for appeal from a certain order made and entered herein on the 15th day of April, 1902, modifying a certain temporary restraining order made and entered herein on the 21st day of March, 1902, to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which the plaintiff should give and furnish upon said appeal, and that upon the giving of said security all further proceedings of this Court be suspended in relation to the operation of said order of modification made and entered on the said 15th day of April, 1902, until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Judicial Circuit; and said petition having this day been duly allowed:

Now, therefore, it is ordered that upon the said plaintiff filing with the clerk of this Court a good and sufficient bond in the sum of two thousand dollars to the effect

that if the said plaintiff and appellant shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings under and by virtue of said order of April 15th, modifying said temporary restraining order of March 21st, 1902, be and they are, hereby suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals, and said order of March 21st, continued in effect to the extent of said modification pending said appeal.

Done in open Court this 25th day of April, A. D. 1902.

M. C. BROWN,
Judge.

[Endorsed]: No. 154. Order. Filed April 25th, 1902. W. J. Hills, Clerk.

In the United States District Court, for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Bond on Appeal.

Know all men by these presents, that we, Frye-Bruhn Company, a corporation, as principal, and D. C. Brownell

and C. B. Haraden as sureties, are jointly and severally held and firmly bound unto the above-named Herman Meyer, and unto John F. Malony and J. H. Cobb, co-partners, under the firm name and style of Malony & Cobb, and each of them, in the sum of two thousand ($2,000) dollars, lawful money of the United States of America, to be paid to them, and each of them, their executors or administrators, and for which payment, well and truly to be made we bind ourselves, our, and each of our heirs, executors, administrators, and assigns jointly and severally firmly by these presents.

Sealed with our seals, and dated the 25th day of April, 1902.

The condition of the above obligation is such that whereas the said Frye-Bruhn Company have taken an appeal to the Circuit Court of Appeals for the Ninth Circuit, to reverse an interlocutory order rendered and entered by the United States District Court for the District of Alaska, Division No. 1, which order was made and entered in the above-entitled suit on the 15th day of April, 1902, and was a modification of a certain temporary restraining order made and entered in the above-entitled cause on the 21st day of March, 1902; and whereas, at a session of the United States District Court for the District of Alaska, Division No. 1, the plaintiffs herein have obtained from said Court an allowance of such appeal and a citation directed to the said Herman Meyer, John F. Malony, and J. H. Cobb, is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco.

And whereas it has been ordered by said Court that a bond in the sum mentioned in this obligation, to be approved by said Court, to be filed herein as required in said order:

Now, the condition of the obligation is such that if the said Frye-Bruhn Company, a corporation, shall prosecute its said appeal from said order, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

FRYE-BRUHN COMPANY,
J. J. DALY, Agent.
D. C. BROWNELL.
C. B. HARADEN.

Witnesses:
LEWIS P. SHACKLEFORD.

United States of America,
District of Alaska. } ss.

D. C. Brownell and C. B. Haraden, being first duly sworn, each for himself, on oath depose and say: I am one of the sureties who signed the foregoing obligation; that I am a resident within the District of Alaska, and within Division No. 1 of the above-entitled court; that I am no counselor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that I am worth the amount specified in the foregoing bond over and above all debts and liabilities, and exclusive of property exempt from execution.

D. C. BROWNELL.
C. B. HARADEN.

Subscribed and sworn to before me this 25th day of April, 1902.

[Seal] I. N. WILCOXEN.

The foregoing bond is hereby approved this 25th day of April, 1902.

M. C. BROWN,
Judge.

[Endorsed]: No. 154. In the United States District Court, for the District of Alaska, Division No. 1. Frye-Bruhn Company, a corporation, Plaintiff and Appellant, vs. Herman Meyer, Defendant and Respondent, and Malony & Cobb, Respondents. Bond on Appeal. Filed April 25. W. J. Hills, Clerk. Winn and Shackleford, Attorneys for Plaintiffs and Appellants. Juneau, Alaska.

In the United States District Court for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Citation on Appeal.

United States of America—ss.

The United States to Herman Meyer and to John F. Malony and J. H. Cobb, copartners under the firm name and style of Malony & Cobb, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the United States District Court for the District of Alaska, Division No. 1, wherein Frye-Bruhn Company, a corporation is plaintiff and you are defendant in error, to show cause, if any there be, why the certain interlocutory order made and entered in said cause on the 15th day of April, 1902, modifying a temporary injunction theretofore entered in said cause upon the 21st day of March, 1902, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 25th day of April, 1902.

M. C. BROWN,

Judge of the United States District Court for the District of Alaska, Division No. 1,

Attest:

[Seal] W. J. HILLS,

Clerk.

United States of America,
District of Alaska. } ss.

I, James M. Shoup, United States Marshal for District of Alaska, Division No. 1, do hereby certify that the foregoing citation on appeal came into my hands for service on the 29th day of April, 1902, and that I served the same upon Jno. F. Maloney and John H. Cobb, respondents herein, by delivering a copy of the foregoing, certified to by W. J. Hills, clerk of the United States District Court for the District of Alaska, Division No. 1, to each of them personally and in person on 30th day of April, 1902, in the town of Juneau, District of Alaska.

JAMES M. SHOUP,

United States Marshal for the District of Alaska, Division No. 1.

By E. F. Kelly,
Office Deputy.

[Endorsed]: No. 154. In the United States District Court for District of Alaska, Division No. 1. Frye-Bruhn Company, Plaintiff, vs. Hermann Meyer, Defendant. Citation on Appeal. Filed April 30, 1902. W. J. Hills, Clerk. By ..... Deputy. Winn & Shackleford, Attorneys for Plaintiffs and Appellants, Juneau, Alaska.

In the United States District Court for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff,
vs.
HERMAN MEYER,
Defendant.

Citation on Appeal.

United States of America—ss.

The United States, to Herman Meyer, and to John F. Malony and J. H. Cobb, copartners under the firm name of Malony & Cobb, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the United States District Court for the District of Alaska, Division No. 1, wherein Frye-Bruhn Company, a corporation, is plaintiff, and you are defendant in error, to show cause, if any there be, why the certain interlocutory order made and entered in said cause on the 15th day of April, 1902, modifying a temporary injunction theretofore entered in said cause upon the

21st day of March, 1902, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this —— day of April, 1902.

M. C. BROWN,

Judge of the United States District Court for the District of Alaska, Division No. 1.

Attest:

[Seal] W. J. HILLS,

Clerk.

United States of America,
First Division,
District of Alaska.

The above is a true copy from the record of an order made by the above court on the 25 day of April, 1902.

Witness my hand and the seal of said Court this 25th day of April, 1902.

[Seal] W. J. HILLS,

Clerk.

[Endorsed]: No. 154. In the United States District Court, Division No. 1, Alaska. Frey-Bruhn Company vs. Herman Meyer. Citation.

In the United States District Court for the District of Alaska, Division No. 1.

FRYE-BRUHN COMPANY (a Corporation),

Plaintiff,

vs.

HERMAN MEYER,

Defendant.

Marshal's Return.

The United States of America, } ss.
District of Alaska. }

I, James M. Shoup, United States Marshal for the District of Alaska, Division No. 1, do hereby certify that the citation on appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit issued out of the above-entitled court and cause, which is hereto attached, came into my hands on the 8th day of May, A. D., 1902, and that I served the same on Herman Meyer, the above-named defendant, by delivering to and leaving with W. F. De Mert, the agent and representative of the said Herman Meyer at the said Herman Meyer's place of business in the town of Skaguay, Alaska, a full, true, and correct copy of the said citation on appeal,

certified by me to be such, on the 10th day of May, A. D. 1902; the reason the same was not served by delivering the said copy to the said Herman Meyer in person was that the said Herman Meyer is temporarily absent from the town of Skaguay, with no prospects of his return to said place before the return day mentioned in said citation.

Dated this 10th day of May, A. D. 1902.

JAMES M. SHOUP,
United States Marshal.
By John W. Snook,
Deputy United States Marshal at Skaguay.

Marshal's fees, $3.00.

[Endorsed]: Filed May 12, 1902. W. J. Hills, Clerk. By ....., Deputy.

In the United States District Court for the District of Alaska, Division No. 1, Skaguay.

FRYE-BRUHN COMPANY (a Corporation),
Plaintiff and Appellant,

vs.

HERMAN MEYER,
Appellee.

J. H. COBB and JOHN F. MALONY, Law Partners Under the Firm Name and Style of MALONY & COBB,
Respondents.

Clerk's Certificate to Transcript.

The United States of America,
District of Alaska,
Division No. 1. } ss.

I, W. J. Hills, Clerk of the United States District Court for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing 29 typewritten pages numbered one (1) to twenty-nine (29) inclusive, and twenty-nine pages in all, constitute a true and correct transcript of all the record and proceedings had in the above-entitled cause, and the same is a return to the order allowing appeal herein;

That said transcript on appeal was prepared by appellant;

That the cost of examination and certification thereof amounting to two and 70-100 dollars ($2.70) has been paid to me by appellant.

In testimony whereof, I have hereunto set my hand and the seal of said Court this 26 day of April, A. D. 1902.

[Seal] W. J. HILLS,
Clerk.

[Endorsed]: No. 842. In the United States Circuit Court of Appeals for the Ninth Circuit. Frye-Bruhn Company, a Corporation, Appellant, vs. Herman Meyer, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed May 23, 1902.

F. D. MONCKTON,
Clerk.

No. 842

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRYE-BRUHN COMPANY, a corporation,
Appellant,

vs.

HERMAN MEYER et al., *Appellees.*

BRIEF OF APPELLANT

S. H. PILES,
GEORGE DONWORTH,
JAMES B. HOWE,
For Appellant.

WINN & SHACKLEFORD,
Of Counsel.

JOHNSON & HAMPSON S. & P. CO., SEATTLE.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRYE-BRUHN COMPANY, a corporation, *Appellant*, vs. HERMAN MEYER, et al., *Appellees.*	No. 842

BRIEF OF APPELLANT

STATEMENT OF CASE.

This is an appeal, under Section 507, page 252, of the Code of Alaska, from an interlocutory order dissolving a temporary injunction restraining appellee Meyer from enforcing a judgment recovered by him against appellant until the determination of this suit, which was instituted by appellant against Meyer to set off reciprocal judgments. The temporary injunction was dissolved to the extent of allowing the attorneys who had recovered

the judgment in favor of appellee Meyer against appellant to withdraw from the registry of the court the sum of one thousand dollars as an attorney's fee for procuring that judgment.

On June 28, 1899, Charles H. Frye recovered in the Superior Court of the State of Washington for King County a judgment against the appellee Herman Meyer for the sum of $3140.10 with interest and costs (R. 5-6). This judgment, although recovered in the name of Frye, was recovered by him as trustee for the appellant company, a corporation, of which he was president, and was assigned by him to the corporation on the 27th day of January, 1900 (R. 7. 23-24).

On March 21st, 1902, the appellee Meyer, in cause No. 849 in the District Court of Division 1 of the District of Alaska, recovered judgment against appellant for 45 per cent of $6295.00, after paying the costs in said suit (R. 7-8). In said cause No. 849 there had been paid into the registry of the court the sum of $3857.50, proceeds of sale of certain property involved in said suit, which said sum was ordered to be retained in the registry of the court until paid out under the decree in said cause (R. 12-13). On the same day that Meyer recovered judgment against appellant, appellant brought a suit in equity, in the same court rendering said judgment, upon the judgment recovered by Frye in the State of Washington against Meyer. In the suit brought by appellant in the District Court of Alaska, it alleged in its complaint the recovery of the judgment by Frye against Meyer, the assignment of the judgment by Frye to it on the 27th day of January, 1900, the issuance of an execution in the

State of Washington against Meyer and a return of *nulla bona,* the recovery by Meyer of a judgment against appellant, the existence of money in the registry of the court applicable to the payment of said judgment, the insolvency of Meyer, and that Meyer had threatened to, and unless prevented would, assign said judgment, and that execution thereon would be issued (R. 4-11). The complaint prayed the issuance of a temporary injunction restraining Meyer from assigning the judgment and from causing execution to be issued thereon, and that the clerk of the court be ordered to refrain from paying out any money in cause No. 849 until the further order of the court. It also prayed that the above mentioned judgments be set off one against the other, and that on such set off, if there should be any deficiency in favor of appellant, it should have judgment therefor against Meyer (R. 10-11). The application for an injunction was supported by affidavit (R. 11-12). The District Court of Alaska, on the same day that said complaint was filed, granted the injunction prayed for (R. 14-15). On April 11, 1902, Malony & Cobb, attorneys at law, who had recovered the judgment in favor of Meyer against appellant in cause No. 849, filed a motion in cause No. 154, being the cause instituted by appellant against the appellee Meyer, to off-set the said judgments, and by said motion sought to have the injunction which had been granted dissolved to the extent of allowing them to withdraw from the registry of the court the sum of $1000.00, for which amount they claimed a lien on the judgment in cause No. 849 (R. 19-20). This motion was based upon the affidavit of J. H. Cobb, in which he averred that it had been agreed

between Meyer and Malony & Cobb that for their services as attorneys in said cause No. 849 Malony & Cobb should be paid $1000.00 and an additional amount dependent on certain contingencies; that $1000.00 was due and payable to them, and that they were entitled to a lien therefor upon the judgment recovered in cause No. 849 (R. 20). Appellant filed its objection to the modification prayed for, and objected to the consideration of the application for said modification, on the ground that the court had no jurisdiction to act in the matter on said application (R. 21). Appellant also filed an affidavit of its agent showing that the judgment recovered in the name of C. H. Frye against the appellee Meyer in the State of Washington had been recovered by Frye in trust for appellant on an indebtedness which existed in favor of appellant against Meyer before the action of Meyer against the appellant had been commenced (R. 23-24). On the 15th day of April, 1902, the court granted the motion of Malony & Cobb and dissolved the temporary injunction theretofore granted, so as to allow Malony & Cobb to withdraw from the registry of the Court the sum of $1000.00 in cause No. 849 (R. 22). Appellant excepted to said order, appealed therefrom, its appeal was allowed, it duly filed its assignments of error, and executed its *supersedas* bond which was approved by the Court (R. 28-36). The assignments of error are as follows:

"First. That the court erred in overruling plaintiff's objections filed herein to the motion filed by Malony & Cobb to modify the restraining order made and entered by this court on the 21st day of March, 1902; and erred in the consideration of said motion of Malony & Cobb,

over the objections filed herein by said plaintiff as aforesaid.

"Second. The court erred in granting the order to modify the injunction granted herein on the 21st day of March, 1902, so that the same would not restrain Malony & Cobb from withdrawing from the funds in court one thousand dollars ($1000), which said order modifying said injunction or restraining order was made and entered herein on the 15th day of April, 1902, and on motion of the said Malony & Cobb based upon the affidavit of J. H. Cobb and the files in this cause."

Appellant relies on the following specifications of error for the reversal of the order of the court of the 15th day of April, 1902, dissolving the temporary injunction:

First. The court erred in considering in cause No. 154 the motion of Malony & Cobb for the dissolution of the temporary injunction granted in that cause, because Malony & Cobb were not parties to that suit and had not intervened therein, and also in adjudicating their right to a lien in advance of a trial.

Section 41, page 151, of the Code of Alaska is as follows:

"Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter of litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint setting forth the ground upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attor-

neys of the parties who have appeared, who may answer or demur to it as if it were an original complaint."

We do not think that any case can be found wherein a suit brought for the purpose of setting off one judgment against another, and where an attorney claimed a lien paramount to the rights of the party seeking the set-off, such claim was made by motion. The enforcement of the lien must be on intervention by the attorney or by a new suit. Where the question of the right of lien is to be determined between the plaintiff and his attorney only, or where the right of an attorney to a lien is to be determined where his client has settled the cause with the defendant, a motion in the original case may be proper, but in all other cases a new suit or an intervention is necessary. The Alaska Code (Section 41, p. 151) requires an intervention.

In the case of Patrick vs. Leech and others, 17 Fed. R. 476, certain attorneys petitioned for the establishment of their lien upon a judgment. Their right to a lien was disputed by the defendants in the case, on the ground that no notice of lien had been given. It was claimed by the petitioners that such notice had been given, and the court held that there was an issue to be tried. The court held that the only way in which the petitioners could appeal from the ruling of the court holding that they had no lien was by taking an appeal from the final decree, and therefore it ordered the petitioners made parties to the cause. In the case now before the court, Malony & Cobb filed a motion in a case in which they had never appeared, and undertook to assert rights in behalf of themselves, and the court, without any trial of that ques-

tion, granted them the relief prayed for. We submit that the court was without jurisdiction to determine any of the claims of Malony & Cobb until they had obtained a standing in the case by intervening therein.

Second. The court erred in dissolving the temporary injunction to the extent of allowing Malony & Cobb to withdraw $1000 from the registry of the court, for the reason that Malony & Cobb had no lien upon said judgment at the time the temporary injunction was granted.

The Code of Alaska, Section 742, page 298, so far as applicable to the case now before the court, is as follows:

"An attorney has a lien for his compensation, whether specially agreed upon or implied, as provided in this section. * * * * Third. Upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed, *from the time of giving notice of the lien to that party.*" (Italics ours). "Fourth. Upon a judgment to the extent of the costs included therein, or if there be a special agreement, to the extent of the compensation specially agreed on, *from the giving notice thereof to the party against whom the judgment is given and filing the original with the clerk where such judgment is entered and docketed. This lien is, however, subordinate to the rights existing between the parties to the action or proceeding.*" (Italics ours.)

As above stated, the judgment recovered by Frye in the State of Washington, which was recovered in his name though in fact as trustee for appellant, was recovered prior to the recovery of the judgment by appellee Meyer against appellant. It was assigned by Frye to appellant prior to the recovery of the judgment by Meyer against appellant. On the same day that Meyer recovered his judgment against appellant, appellant filed its bill in

equity against Meyer in the District Court of Alaska for the set-off of said judgments, and obtained the restraining order above mentioned. The judgment in favor of Meyer was recovered March 21, 1902. It was not until the 11th day of April, 1902, that the motion of Malony & Cobb was filed. The record shows that Malony & Cobb had no lien upon the judgment recovered by Meyer against appellant. They did not give any notice of lien to appellant, nor did they file the original of any notice of lien with the clerk where the judgment was entered. It is clear beyond dispute that as against the appellee Meyer the appellant had the right to set-off the judgment it owned against Meyer, against the judgment owned by Meyer against it. It is unnecessary to cite many cases to establish this proposition, for it is so elementary that it is laid down in the text books as a rule firmly established.

"Where reciprocal claims between different parties have passed into judgment, it is the established practice of the courts to set-off one judgment against another and enter satisfaction of both to the amount of the smaller demand, and judgment for one party may be withheld until the other by using due diligence may obtain his judgment, so that the one may be set-off against the other, or that the one execution may balance the other."

Am. & Eng. Ency. of Law, 1st ed., Vol. 22, p. 445.

"The power to set-off one judgment against another does not rest upon any statute, but upon the general jurisdiction of courts over their suitors, and their general superintendence of proceedings before them."

Same work, p. 446.

"JUDGMENTS IN DIFFERENT COURTS. Formerly judgments recovered in different courts could

be set-off against each other in equity only, but it is now settled that mutual judgments may be set-off against each other either at law or in equity, whether obtained in the same or different courts. Thus judgments in different districts of the same court may be set-off against each other, and a judgment of an inferior court may be set-off against one of a superior court, and a judgment in the courts of one of the states and one of a federal court or a court of a sister state may likewise be set-off against each other."

Same work, p. 456.

Duncan vs. Bloomstock, 2 McCord (S. C.), 318, 13 Am. Dec., 728.

Brown vs. Hendrickson, 39 N. J. L., 239.

Rix vs. Nevins, 26 Vt., 384.

Hobbs vs. Duff, 23 Cal., 596.

The proposition that in equity one judgment may be set-off against another, although the judgments may have been rendered in different jurisdictions, is so firmly established that we do not suppose it will be disputed by counsel for appellees. The only question then to be considered is whether that right of set-off is paramount to the claim of Malony & Cobb, or whether their claim is paramount to appellant's right of set-off. In this connection it must be borne in mind by the court that the decisions of the courts of states where the statute giving an attorney's lien dates that lien from the commencement of the action have no application to the case at bar. In the case at bar, the right of the attorneys of appellee Meyer to assert a lien is dependent upon compliance with the provisions of Section 742, page 298, of the Code of Alaska. That section is taken from the law of Oregon, enacted October 11, 1862, and upon comparison with the

Minnesota statute it will be found to be the same as the Minnesota statute. The third subdivision of the section is the same also as the Iowa statute. The decisions of Iowa, Minnesota and Oregon upon the meaning of the statutes of those states are therefore authoritative.

In the case of Forbush vs. Leonard, 8 Minn., 303, the question was presented whether an attorney had a lien upon the judgment recovered in the action. The court said:

"The lien of an attorney, whatever it may have been at common law, is in this state regulated by statute, and we must accordingly confine the parties to such only as the statute recognizes and enforces. The provision of the statute is contained in section 16, chapter 82, of the compiled statutes, which is in the following words: 'Sec. 16. An attorney has a lien for his compensation, whether specially agreed upon or implied, as provided in this statute: 1. Upon the papers of his client, which have come into his possession, in the course of his professional employment; 2. Upon money in his hands belonging to his client; 3. Upon money in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party; 4. Upon a judgment to the extent of the costs included therein; or, if there be a special agreement, to the extent of the compensation specially agreed on, from the time of giving notice to the party against whom the judgment is recovered. This lien is, however, subordinate to the rights existing between the parties to the action or proceeding."

The court later on in the opinion said: (Italics ours.)

"Where a lien is to be insisted on, and any person other than the client is affected thereby, it will be observed *that notice of the lien must be given.*"

And again the court said:

"By the fourth subdivision of the section above recited, where there has been a special agreement for compensation, the statute gives a lien, *after notice,* to the extent of the compensation specially agreed on."

In Dodd vs. Brott, 1 Minn., star pp. 270, 274, the court said: (Italics ours.)

"It has been urged that although the assignment" (an assignment of the judgment to the attorneys) "may be ineffectual for want of notice to Brott, still the attorneys for the plaintiff had a lien upon the judgment for the amount of the costs. There are two reasons fatal to this position. The first is, the statute does not admit of this construction. The grammatical arrangement of the section and its punctuation *leave no doubt whatever that notice to the debtor in order to effect a lien upon the judgment is necessary,* as well when the attorneys claim a lien upon the costs *as when they claim it upon a portion of the judgment by virtue of a stipulation or agreement."*

In Crowley vs. LeDuc, 21 Minn., 412, the court held that a notice of lien was sufficient if it fairly stated the amount to which the lien claimant was entitled, but approved the case of Forbush vs. Leonard to the extent of holding that a notice was requisite. The court said:

"The notice in a case like this is sufficient if it fairly inform the party that a lien is claimed, its nature and character, for what it is claimed and upon what it is intended to be enforced."

In the case of In re Scoggin, 5 Sawyer, 549, Judge Deady assumed, as a matter about which there could be no dispute, that, under the Oregon statute, notice of the claim of lien was necessary.

In Day vs. Larsen, 47 Pac. Rep., 101, the Supreme Court of Oregon, construing the same statute incorporated in the Alaska Code, said:—

"By section 1044 of Hill's Annotated Laws it is provided that an attorney has a lien for his compensation to the extent the same may have been specially agreed on, 'from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk where such judgment or decree is entered and docketed.' These words carry their meaning plain upon their face, and fix, as the time when the lien shall attach as against the judgment debtor, the giving of notice to him, and filing the same with the clerk. The right to acquire the lien is a privilege of which the attorney may avail himself, by giving and filing the notice as required by the statute; but he has no lien or claim upon the judgment, as against the judgment debtor, prior to that time. As to him, the notice creates and originates the lien, and the statute specifically fixes the time from which it shall exist. He is a stranger to the contractual relations between the attorney and his client, and no right can be acquired against him under the statute before the prescribed notice is given."

In Jones on Liens, Vol. 1, Sec. 179, he states it to be the law in Minnesota that an attorney has a lien upon a judgment from the time of giving notice to the party against whom the judgment is rendered, and that the lien is subordinate to the rights existing between the parties to the action or proceeding. In Section 180 he states that the Oregon law is the same as the Minnesota law, except that the Oregon law requires the original notice to be filed with the clerk.

The case of Hurst vs. Sheets, 21 Iowa, 501, was decided by Judge Dillon, afterwards a judge of the Circuit Court of the United States. The question involved was whether the lien of an attorney was paramount to the right to off-set one judgment against another. At page 504 Judge Dillon says:

"The general question presented by this record and the only one argued by counsel is, whether the right to set off the sum recovered in one action against that recovered in another between the same parties, is superior to the lien of the attorney for services. Hurst obtained his judgment against Sheets the same day (June 8th) on which Sheets obtained his judgment against Hurst. In point of time, the judgment in favor of Hurst was first rendered. Perry was the attorney of Sheets, and procured his judgment for him. His services and the reasonableness of his charge therefore are not disputed. Nor is it controverted that Sheets was insolvent. It is settled, as against Sheets, that Hurst has the right to have the set-off allowed to the full amount of his judgment. Hurst v. Sheets and Trussell, 14 Iowa, 322. And the question is whether this right of Hurst to have the set-off allowed against Mr. Perry's client, equally obtains against Mr. Perry's lien as an attorney."

At page 506, the court proceeds, after citing the statute, which is substantially similar to subdivisions 2nd and third, Section 742, page 298, of the Alaska Code:

"Under this, the attorney's lien, as against the adverse party, exists only *from the time of giving him notice of the lien.* This is clear. And this fixes the time of the commencement of the lien. Now, in the case at bar, the attorney gave no *personal* notice, verbal or written, of his lien to the adverse party. The judgment in favor of the adverse party existed anterior to the judgment against him in favor of the attorney's client, and anterior to any notice (conceding, for the argument, that, from the time Hurst knew of the written notice of the attorney of his lien, which notice was pasted in the judgment docket, he would be bound by it), which he had that the attorney claimed a lien. His right of set-off existed and was matured prior to the existence of the attorney's lien, as this latter lien exists only 'from time of *giving* notice of the lien to the adverse party.' Rev. Sec. 2708. The lien of the attorney is upon what? The statute answers: It is 'upon money due his client in the hands of

the adverse party' at the time of *notice given* by the attorney, to that party, of his lien. * * * We decide this case upon the ground that the right of set-off was complete, and the amount ascertained and fixed, at and *before* the time the lien of the attorney commenced, as it began only from the time Hurst had received notice." (Italics the court's.)

In National Bank of Winterset vs. Eyre, 8 Fed. Rep., 733, Judge McCrary held that the right to set-off one judgment against another given by the Iowa statute could not be defeated unless it was defeated by the claim of lien of the attorneys who recovered the judgment against which it was sought to off-set the other judgment. He held that the statute in regard to set-off was declaratory of the common law and of the general principle of equity allowing mutual judgments to be set-off one against the other. He then proceeds:

"Can the right of set-off be defeated by the filing of an attorney's lien? I think not. If Eyre had assigned his entire claim before judgment to Wainwright & Miller" (the attorneys) "and they had sued on it, I think it clear that the assignment would have been subject to the set-off previously held by the bank. The claim was not negotiable, and the assignees would have taken it subject to any defence existing in the hands of the bank. Surely no greater right can be acquired by the filing of an attorney's lien than would have resulted from such an assignment. I think the weight of authority, as well as the better reason, supports the rule that the lien of the attorney is upon the *interest* of his client in the judgment, and is subject to an existing right of set-off in the other party."

The Alaska Code, Subdivision 4, Section 742, *supra,* expressly makes the lien "subordinate to the rights existing between the parties."

In Patrick vs. Leach, 12 Fed., 661, the court, after holding that the attorney was not entitled to a lien for certain reasons, proceeded:

"If, however, I am wrong upon this proposition, I am very clearly of the opinion that no lien has been established in this case, for the reason that no sufficient notice was given under the provisions of the statute, assuming that it was applicable. The notice provided for is undoubtedly personal notice, and I think very clearly it should be in writing."

In Turner vs. Crawford, 14 Kan., star pp. 500-503, the question involved was the claim that an attorney's lien and an assignment of the judgment were paramount to the right to set-off another judgment against the judgment on which the lien was claimed. The court said:

"We do not think that the assignment of the Turner judgments to Hadley & Glick, or their attorney's lien on said judgments, can make any difference in this case. Crawford's claim and judgment existed prior to the Turner judgments, prior to the said assignment to Hadley & Glick, and prior to their attorney's lien. Turner could therefore not assign his judgments, nor the claims upon which they were rendered, nor incumber such claims or such judgments with attorney's liens, or any other kind of liens, so as to defeat Crawford's right to have his judgment or his claim compensate and pay the Turner judgments or claims."

This decision was rendered at a time when Mr. Justice Brewer was upon the bench of the Supreme Court of Kansas.

In Kansas Pacific Ry. vs. Thacher, 17 Kan., pp. 92, 100, 101, the opinion was rendered by Judge Brewer. After setting forth the Kansas statute, which is almost

verbatim subdivisions 2nd and third of Section 742 of the Alaska Code, the court proceeds:

"Again, according to the statute the lien dates from the 'time of giving notice.' Now in reference to this notice these questions arise: Must it be in writing? Is service upon the attorney of record of the adverse party sufficient? In case of a railroad corporation, upon what officer or agent should it be served? Must the amount of the lien claimed be stated? The statute is silent upon these questions; at least, it gives no specific answer to them. And yet, taking the statute in connection with other statutes, and with general rules of law, we think the matters not difficult of solution. It is a general rule, though one with perhaps some exceptions, that notices required in legal proceedings must be in writing. * * * * * The attorney is to *give notice.* By the notice thus given he seeks to create a lien upon and establish a right to receive a portion of the money due in that action to his client from the adverse party. It seems to us that it is fairly to be taken as a notice in the action or proceeding, and one which therefore must be in writing."

In the case of Fitzhue vs. McKinney, 43 Fed., 461, the Circuit Court for the Northern District of Texas had before it the question of the right of set-off of one judgment against another, and whether a claim of lien by the attorney recovering one judgment was paramount to such right of set-off. The court said:

"It can make no difference that complainant's judgments were rendered by the state courts, and the judgment against him was rendered by this court, and therefore application has to be made to this court for relief by bill in equity. If all three of the judgments had been in the state courts, where no distinction between law and equity affects cases, and the complainant would there be entitled to the relief he seeks here, he cannot lose his rights because he was sued in the circuit court. This

court has the right and power to grant him as full relief as he could get in the state courts. If the complainant had the right to have his judgments set off against the respondent's judgment, the right existed at the very instant respondent's judgment was rendered, and could not be affected by the alleged assignments of the judgment to respondent's attorneys or to Rees."

In Boston & Colorado Smelting Co. vs. Pless, 10 Pac., 652, the Supreme Court of Colorado said:

"Nor are Stuart Bros. aided by a reliance upon section 85 of the General Statutes, giving attorneys a lien for fees upon judgments obtained by them. While this lien attaches to the judgment at once upon its recovery, as between attorney and client, so that nothing more is necessary prior to the enforcement thereof against the latter by proper action, we are inclined to the opinion that, to hold the judgment debtor for the creditor's attorney's fee, the former must be notified of the attorney's intention to take advantage of the statute."

In the case of Fairbanks vs. Devereux, 58 Vt., star p. 359, the attorneys for the plaintiff sought to enforce a judgment recovered by their client against the defendant. At the time of the recovery of the judgment, the plaintiff was indebted to the defendants for a balance due on an earlier judgment in their favor against him. The defendants pleaded the judgment in their favor in set-off. The attorneys claimed that such right of set-off was subordinate to their claim of lien. The Supreme Court of Vermont said:

"As we understand, the decisions of Walker vs. Sargent, 14 Vt., 247, and McDonald vs. Smith, 57 Vt., 502, have settled this question in this state in favor of the defendants. The first named decision, while recognizing to its full extent the right of an attorney to a lien upon a judgment which he has been instrumental in recovering,

and to the fruits of such judgment for the payment of his reasonable costs and disbursements against his client and against any assignment thereof by his client, holds that the right secured to the defendant by the statute to off-set to such judgment claims which he then holds against such plaintiff is paramount to such attorney's lien."

In Pirie vs. Harkness, 52 N. W., 581, the Supreme Court of South Dakota rendered a decision sustaining the position taken by appellant in the case at bar, by a process of reasoning which is so clear and forcible that it seems to us to be unanswerable. In that case, Harkness had recovered judgment against Pirie & Co. Pirie & Co. had a judgment against Harkness, and applied to have their judgment set-off against the judgment recovered by Harkness. The attorney of Harkness claimed a lien on the judgment recovered by Harkness against the company. After setting forth the statute of South Dakota, which is substantially similar to subdivisions second and third, Section 742, page 298, of the Alaska Code, the court said:

"The attorney's lien attaches and becomes an active instead of a potential right 'from the time of giving notice in writing to the adverse party;' but before this was done in this case appellants had openly asserted and begun to exercise their right to have these judgments set-off, by giving notice of such application to the court, as provided by statute. The attorney claiming the lien knew of this, for the notice was served upon him. When this notice was given, and appellants' right to set-off was so acted upon, the attorney's claim for lien was still only a possibility—an inchoate right. He had not yet done the very thing which, under the statute, was required to make it an operative lien, and did not do it, nor attempt to do it, until another and adverse right had attached, a right which the subsequent notice did not dis-

place. We think appellants' right to have these judgments set-off *pro tanto* attached and became operative before the notice was given, which under the statute would fix the commencement of the attorney's lien, and being prior in point of time was prior in point of right."

Now, applying this decision to the case at bar, we see that it is directly in point. In the case at bar, the appellant was the owner of a judgment against the appellee Meyer prior to and at the time that the appellee Meyer recovered his judgment against appellant. No claim of lien was made by Malony & Cobb on the judgment recovered by Meyer until the 11th day of April, 1902. The judgment recovered by Meyer was recovered by him on the 21st day of March, 1902. On the 21st day of March, 1902, the appellant filed its bill in equity whereby it sought to set-off the judgment owned by it against Meyer, against the judgment owned by Meyer against it. At that time, Malony & Cobb had no lien, and the rights of appellant against appellee were fixed. The District Court of Alaska granted the temporary injunction prayed for by appellant, and restrained Meyer from taking any steps to enforce his judgment until the determination of the suit brought by appellant against Meyer, and also directed the clerk of the court to withhold payment of any funds in the registry of the court deposited in the case in which Meyer recovered judgment against appellant. Thereafter Malony & Cobb, without complying with the statute of Alaska by giving notice of a lien, and without taking any steps whatsoever to acquire a lien upon the judgment, made a motion in the case brought by appellant against appellee Meyer to modify the temporary injunction so as to establish a lien in favor of

Malony & Cobb paramount to appellant's right to set-off its judgment against the judgment owned by Meyer. It is perfectly clear that had Malony & Cobb remained silent, the judgment owned by appellant would have extinguished the judgment owned by Meyer. Its right to that extinguishment became a vested right when it brought suit to set-off one judgment against the other. Malony & Cobb could not ignore the statute of Alaska and displace the right of appellant to such set-off.

The order in cause 154 dissolving the temporary injunction so as to allow Malony & Cobb to withdraw an attorney fee of $1000 from the registry of the Court in cause 849, not only ignored the plain provisions of the statute fixing the date of the creation of an attorney's lien from the giving notice thereof to the judgment debtor and filing the original with the Clerk, but also the equally plain provision that:

"This lien is, however, subordinate to the rights existing between the parties to the action or proceeding."

It will be observed that this provision of the statute follows that requiring notice to be given and filed in order to create the lien. It is plain that the word "existing" has reference to the rights of the parties as they exist at the time of the creation of the lien by the giving and filing of the prescribed notice. Language could not be plainer. Now the right of appellant to set-off its judgment against the judgment of Meyer was a right existing between the parties to the action the instant that appellant instituted this suit, even if it did not exist the moment Meyer recovered his judgment against appellant. No claim is made that at the time this suit was insti-

tuted to set-off these judgments Malony & Cobb had taken any step toward acquiring a lien. Any lien acquired by them after that time, if they ever acquired one, was subordinate to the rights of the parties to the action. If Congress had intended the lien for an attorney fee to attach to a judgment as soon as the judgment should be recovered it would not have specifically provided that an attorney should have a lien on a judgment "From the giving notice thereof to the party against whom the judgment is given and filing the original with the Clerk where such judgment is entered and docketed. This lien is, however, subordinate to the rights existing between the parties to the action or proceeding." At the time appellant instituted this suit to set-off its judgment against the judgment of Meyer against it Malony & Cobb, in the language of Pirie vs. Harkness, 52 North Western Reporter, 581: "Had not yet done the very thing which, under the statute, was required to make it (the inchoate right to a lien) an operative lien, and did not do it, nor attempt to do it, until another and adverse right had attached, a right which the subsequent notice did not displace. We think appellants' right to have these judgments set-off *pro tanto* attached and became operative before the notice was given, which under the statute would fix the commencement of the attorney's lien, and being prior in point of time was prior in point of right."

The following cases also maintain the position of appellant:

Wooding vs. Crane, 11 Washington, 207.
Porter vs. Lane, 8 John., 357.
Nicholl vs. Nicholl, 16 Wendell, 447.

We therefore submit that the interlocutory order of Judge Brown, dissolving the temporary injunction whereby Malony & Cobb were allowed to withdraw from the registry of the court the sum of $1000, should be reversed with costs.

Respectfully submitted,

S. H. PILES,
GEORGE DONWORTH,
JAMES B. HOWE,
For Appellant.

WINN & SHACKLEFORD,
Of Counsel.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRYE-BRUHN CO., (a corporation).
Appellant,
vs.
HERMAN MEYER.
Appellee.
No. 842.

Upon Appeal from the United States District Court for Alaska, Division No. 1.

BRIEF OF APPELLEE.

MALONY & COBB.
Solicitors for Appellee.

Daily Dispatch Print, Juneau.

In The

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRYE-BRUHN CO., (a corporation). Appellant, vs. HERMAN MEYER. Appellee.	No. 842.

Upon Appeal from the United States District Court for Alaska, Division No. 1.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant filed a bill in equity on the 21st day of March, 1902, against the appellee, setting out—

First. The recovery of a judgment by one C. H. Frye against the appellee in the Superior Court of King County, Washington, on the 28th day of June, 1899, for $3,140.10 and costs.

Second. The issuance of execution on the judgment and return of nulla bona in the state of Washington.

Third. An assignment of said judgment to appellant on the 27th day of January, 1900.

Fourth. That on —day of —, 1899, appellee commenced an action in the District Court of Alaska against appellant, and on the 21st day of March, 1902, recovered a judgment

therein for 45 per cent. of $6,295 after paying the costs of said action; that there is money in the hands of the clerk of the court, paid him by Frye Bruhn Co., sufficient to pay said judgment, and which the court had ordered paid thereon.

Fifth. That plaintiff [appellant] believes and alleges the fact to be that it will be unable to collect said judgment against appellee in the future; that appellee is either insolvent or has his property secreted so that it cannot be reached; that appellee has threatened to issue execution on his judgment; that he has threatened to assign his judgment, and will do some or all of these things unless restrained until appellant can establish his rights herein and the judgment recovered by it in King County be offset to the appellee's judgment.

A restraining order was prayed for restraining Meyer from assigning his judgment, and the clerk from paying the money in the registry of the court thereon; for judgment against Meyer for the amount of the King County judgment, and for general relief. (Rec. pp. 4 to 11,)

Jno. R. Winn filed his affidavit with this bill, from which it appeared that the fund in the hands of the clerk, payment of which to Meyer was restrained, was the proceeds of partnership property of appellant and appellee, which was sold under the orders of the court in the case of Frye Bruhn Co. vs. Meyer, and paid into the registry of the court to abide its decision; that the total fund to be divided between the partners was $6,295, less costs of suit, and that of that sum Meyer was entitled to 45 per cent., and there was enough money in the registry, to-wit: $3,857.50, to pay Meyer's part as decreed in the judgment. (Rec. pp. 12 and 13.)

A restraining order was issued as prayed for. (Rec. p. 14)

On April 11th Malony & Cobb, in their own behalf, moved the court to modify the restraining order to the extent of $1,000, asserting a lien to that extent on the money in the

hands of the clerk, as attorneys for Meyer in the suit wherein the money was deposited; and further alleging that the restraining order was improvidently issued, in that it appeared from the complaint that the court had no jurisdiction as a court of equity of the cause of action sued on; and that the complainant had no such interest in or lien upon the fund in court, the payment of which was restrained, as would entitle it to the relief prayed for. [Rec. p. 19.]

With this motion was filed the affidavit of J. H. Cobb, setting forth an agreement between Malony & Cobb and Meyer to pay them $1,000 out of said fund. [Rec. p. 20.]

This motion was granted [Rec. p. 22], and from this order this appeal is taken.

There are two assignments of error:

First, That the court erred in hearing the motion of Malony & Cobb at all.

Second, In granting the order to modify the injunction. [Rec. p. 31.]

Council for appellant have refused to serve their brief if they have prepared one, and we are consequently unenlightened as to the position they will take and the authorities they will cite. In the event the court shall consider the appeal at all, we therefore proceed to show that the order appealed from was right.

We concede at the outset that if the bill had stated facts that entitled the plaintiff to any relief, Malony & Cobb would have been driven to a bill of intervention to protect their rights in the fund in court. But if the bill stated no such facts, and the restraining order was wrongly issued in the first place, the court rightly modified it, to the extent that it interfered with their rights on their motion. Indeed, the court might rightly have dissolved the restraining order instead of modifying it.

A consideration of the bill and the accompanying affidavit, shows that it is not a case of set-off at all. It is nothing more nor less than a bill brought to reach a fund in the registry of the court and awarded to Herman Meyer, and have it applied upon the judgment to be obtained on the judgment of the King County court. Reduced to its simplest terms the court is asked to do three things: 1st, to hold by a restraining order Meyer's money in court until the King County judgment is merged into a judgment in the District Court of Alaska; 2nd, to render judgment for appellant against Meyers on the King County judgment, and, 3rd, to then appropriate the money of Meyer in the registry of the court to the payment of this judgment. In orther words, it is a creditor's bill to reach a certain asset of the defendant, and as such it cannot be maintained, for these reasons.

A judgment of another state cannot be made the basis of a creditor's bill. It must be sued over before it becomes a judgment for the purpose of any relief, either at law or in equity.

Claflin vs. McDermott, 12 Fed., 375.

National Tube Works vs. Ballou, 147 U. S., 517.

Union Trust Co. vs. Boker, 89 Fed., 6.

United States vs. Eisenbeis, 88 Fed., 4.

In the latter case, a bill was filed to reach money in the hands of the court, and awarded to the defendant in a domestic judgment of the state of Washington. Insolvency of the debtor was alleged, and also a lien upon the fund. After deciding that the facts alleged failed to show a lien, Judge Hanford dismissed the bill, one of the grounds being that it failed to show that plaintiff had exhausted his legal remedies.

Here the plaintiff has never pursued his legal remedies according to his own showing. As is said in the cases cited above, the holder of a foreign judgment is a mere creditor at large. He should sue at law on his judgment and endeavor to collect it by execution. Until he has done that he has no standing to invoke equitable relief. We respectfully submit that the order appealed from is right and should be affirmed.

MALONY & COBB,

Solicitors for Appellee.

No. 843

—IN THE—

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

EMPIRE STATE IDAHO MINING & DEVELOPING COMPANY,
Appellant,

vs.

KENNEDY J. HANLEY,
Respondent.

BRIEF OF APPELLANT.

W. B. HEYBURN,
Solicitor for Appellant.

——IN THE——

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

EMPIRE STATE IDAHO MINING & DEVELOPING COMPANY,
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BRIEF OF APPELLANT.

W. B. HEYBURN,
Solicitor for Appellant.

——IN THE——

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

EMPIRE STATE IDAHO MINING & DEVELOPING COMPANY,
Appellant,

vs.

KENNEDY J. HANLEY,
Respondent.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This is an appeal under Section 7 of the Act of March 3rd, 1891, establishing the Circuit Court of Appeals, and the amendment thereto, found in the 31 Statutes at Large, page 660.

The Circuit Court has, by an interlocutory order, granted an injunction in this cause, which is one from which a final decree might be taken under the provisions of the said Act to the Circuit Court of Appeals, and this appeal was taken

within 30 days from the date of the order granting the injunction.

The appellant owns an undivided seven-eighths interest in the Skookum lode claim, and the respondent owns an undivided one-eighth interest in said claim. It appears by the record that the appellant, at the time of the granting of the injunction, was mining ores within the Skookum claim; that the appellant and respondent were mining partners under the laws of Idaho, in the operation of said claim; that neither party was excluding the other from the claim; that an accounting was ordered and in progress between the parties to determine their relative proportion of the profits of said claim. No charge is made that the claim was not being worked in miner-like and economical manner, or that any waste or damage was being committed.

In the suit in which the injunction was granted it was originally alleged that Hanley owned certain interests, and that he was being excluded therefrom; that this appellant's grantor had wrongfully procured a deed from him for a one-eighth interest in the property, and the suit was brought to compel a cancellation of said deed. Some vague allegations as to the existence of ore were stated in the complaint, but neither side at the trial considered that any issue of the kind was presented, and the record so shows. The Court that tried the case was of the same opinion, and the record so shows.

This Court ordered that a decree be entered in conformity with its opinion, which was simply that Hanley was entitled to

a one-eighth interest, and that the deed should be cancelled.

The question before the Circuit Court was, what action should be taken in the case upon the filing of the mandate in the Court below.

The Court did not enter a decree upon the mandate, and took no action thereon except to make an order that Hanley should be allowed to enter the premises freely, which was conceded in open Court by this appellant; that Hanley should have an accounting, which was already ordered and in progress, and then the Court assumed to grant an injunction against this appellant, the owner of an undivided seven-eighths, enjoining it from extracting the ore or mining within the lines of the said Skookum claim, until the further order of the Court.

From that order this appeal is taken.

SPECIFICATION OF ERRORS.

This appellant specifies as error the order of the Court enjoining the appellant from extracting ore from the Skookum lode claim.

That such order was a violation of the rule of mining partnership as established by the statutes of the State of Idaho, which said statutes are set out fully in the assignment of errors presented with the petition for appeal in this cause.

The Court erred in enjoining the appellant from working the Skookum mine upon the petition of a minority owner in said property.

ARGUMENT.

Hanley's title to an undivided one-eighth interest in the Skookum claim is established by the decree of this Court, and there remains nothing further to be done so far as that question is concerned, so that the injunction in this cause cannot be said to have been granted pending the determination of the ownership of either of the parties to that controversy.

The inquiry arises as to how long this injunction is to be in force, and to what end and for what purpose? The Court does not say; it is simply until the further order of the Court. Is it intended as a punishment of the appellant that he should be enjoined for a certain length of time at the discretion of the Court. It cannot be intended that the injunction shall remain in force in order that the respondent may be enabled to make a favorable settlement with the appellant, or that the injunction shall remain in force that the respondent may use it as a lever in his attempt to compel the appellant to purchase his interest in the Skookum claim, or buy him off in the litigation. We are unable to discover any object that the Court could have in granting the injunction. It can hardly be conceived that the Court, anticipating the result of an accounting in progress, should enjoin the working of the property, the subject of the accounting.

Injunctions may be granted to secure parties in their asserted rights pending the determination thereof. They may be granted where one party excludes or threatens to exclude another from possession to which he is entitled, or where one partner refuses to account to another.

None of these facts now exist in this case. Courts do not grant injunctions because of things that happened in the past, if they do not continue at the time of the application for the order. Neither do Courts use the injunctive process as a means of punishment; neither do Courts collect judgments by injunctions.

Let us inquire as to what are the rights of these parties under the laws of Idaho, because it is the laws of that State that must govern them in their property rights, and the right to work a mine is a property right, regulated by statute and no Court can disregard the right given by such statute.

The Supreme Court of Idaho, in interpreting the statute regulating mining partnerships, says:

"Section 3300, Rev. St. of Idaho, is as follows: A min-
" ing partnership exists when two or more persons, who make
" or acquire a mining claim, for the purpose of working it, and
" extracting the mineral therefrom, actually engage in working
" the same. 'It is not necessary that all the co-owners in a
" mining claim shall engage in working the mine, together or
" separately. The partnership exists without an agreement,
" either express or implied. Section 3301 is as follows: 'An
" 'express agreement to become partners, or to share the profits
" ' and losses, is not necessary to the formation or existence of
" ' a mining partnership. The relation arises from the owner-
" ' ship of shares or interests in the mine, and working the
" ' same for the purpose of extracting the ores therefrom.'
" The relation differs from that of tenants in common, in this:

"That the co-owners in a mine are partners without agree-
"ment to become such, while tenants in common are not,
"except by agreement.

"The necessity for this relationship arises from the
"character of the property, as in working the mine the very
"life, the substance, the sole value of the property is taken
"out and carried away, leaving the ground from whence the
"precious metal is taken barren and worthless for mining pur-
"poses, which in this case, as in others of like nature, is its
"sole and only value. This partnership is admitted by the
"defendant, as it admits that the plaintiff is entitled to seven-
"eighths of the proceeds after paying the same proportion of
"expenses, and so it is specified in the statutes (Section
"3302). 'A member of a mining partnership shares in the
"profits and losses thereof in the proportion which the inter-
"'est or share he owns bears to the whole partnership, capital
"or number of shares.' The mine is the partnership property;
"whether purchased with partnership or individual funds, and
"so says the statute (Section3304): 'The mining ground
"owned and worked by partners in mining, whether purchased
"'with nartnership funds or not, is partnership property.'
"From the foregoing provisions it follows that those owning
"a majority of the shares or interests in a mining partnership
"have the right to control its methods of working, and thus
"says the statute (Section 3309): 'The decision of the mem-
"'bers owning a majority of the shares in a mining partner-
"'ship binds it in the conduct of its business.'

" In Dougherty vs. Creary, 30 Cal., 300, the Court says: " ' It is indispensable to the conducting of the business of min- " ' ing that those owning the major portion of the property " ' should have the control in case all cannot agree.' Further " on the Court says: 'It might and often would work great in- " ' convenience and damage to the minority in interest of a " ' mining partnership, if the majority were allowed to do as " ' they might deem to their own advantage regardless to the " ' rights and interests of the minority. But, notwithstanding " ' the danger of the abuse of power in such cases, what may " ' be necessary and proper for carrying on the business of " ' mining for the joint benefit of all concerned must be de- " ' termined by those owning and holding in the aggregate the " ' major part of the property;' and, if the power thus held " and exercised by the majority is used in a manner that will " imperil or disastrously affect the interests of the minority, " the latter has the right to resort to the Court for redress " and protection. It was long since decided by the Courts that " a mining partnership differed from an ordinary partnership " in many of its features, among which are the following: It " is formed without any express agreement between the parties " existing from joint ownership in a mine, and working the " same. One partner may sell his interest without the consent " of the others or die, and the partnership is not dissolved. A " new owner may purchase an interest in the mine, or inherit " it, and he becomes a mining partner in the working thereof. " Duryea vs. Burt, 28 Cal., 579. It differs from an ordinary " partnership in another respect, also, in that, as stated above,

"the majority in interest have the right to control the method "of working and the means to be employed. In these re- "spects, and in its continuity, it resembles a private corpora- "tion. To avoid mistakes in the position of the parties there- "to, and the condition of the property, all of these character- "istics have been enacted in a statute, as quoted above, in this "State, and also in California and in other mining States. "The case of McCord vs. Mining Company, 64 Cal., 134, is "largely relied upon by the respondent in this case; but that "case does not militate against this opinion. In that case the "majority interest was working the mine, and the questions, "as stated by the Court were, Do the excavating and removing "of cinnabar from a quicksilver mine, or the cutting of timber "trees used in working the mine, by one tenant, constitute "waste from which his co-tenants may recover trebble dam- "ages? Do such excavation, and cutting and conversion, con- "stitute waste which should be enjoined? Are the plaintiffs "entitled to an accounting? These are entirely different "questions from those in the case at bar. In this case the "plaintiff owns the majority interests and asks to be permit- "ted to control the management of the mine, and the method "of working the same, the means employed and that defend- "ant be enjoined, and for an accounting. The facts set forth "in the answer and in defendant's own affidavit furnish abund- "ant reason why the prayer of the plaintiff should be granted."

Hawkins vs. Spokane Hydraulic Mining Company, 28 Pac., 433.

This case was again in the Supreme Court of Idaho, re-

ported in the 33 Pac., page 40, and the doctrine was re-affirmed in a very strong opinion by the unanimous Court. This is the latest expression of the Supreme Court of Idaho on the subject, and establishes the rule that will be followed by this Court.

The Supreme Court of Montana and of some other states have held differently, and have criticised the conclusions of the Supreme Court of Idaho, but such decisions do not affect the rule in Idaho nor afford any reason why this Court should diregard the interpretation the Supreme Court of Idaho has placed upon the statutes of that State.

So long as the appellant does not exclude the respondent and works the mine in an economical and workman-like manner, and accounts for the proceeds according to the ownership in the mine, there can be no ground for enjoining the appellant, nor can any good purpose be served thereby.

It appears by the record that one-sixteenth of the gross proceeds of the ore taken from the Skookum lode claim is now, and for several months past, has been deposited in a bank designated by the Court to the credit of the Court to answer any claim which Hanley may be found upon the accounting to be entitled to as representing his one-eighth interest in the Skookum claim.

If Hanley has any claim for ores that were extracted prior to the judgment in his favor, he will be entitled to a judgment for the value of such ores, whatever that may be determined to be and will have the right to make his judgment as other judg-

ments are made, through the means of an execution issued in the usual way.

He is not entitled to sequester the property of the appellant to secure a debt or obligation; debts are not collected in Courts of equity in that manner.

It is not contended that appellant is insolvent, and if such contention is urged the appellant can give any bond that the Court may require in the premises. There is no admixture of ore except under the conditions and agreed method provided by the order heretofore made by the Court and now in force.

The injunction should not have been granted and the order of the Circuit Court should be reversed.

Respectfully submitted,

W. B. HEYBURN,

Solicitor for Appellant.

——IN THE——

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

EMPIRE STATE IDAHO MINING AND DEVELOPING COMPANY, a Corporation,
Appellant,

vs.

KENNEDY J. HANLEY,
Respondent.

MOTION TO DISMISS APPEAL.

Comes now the respondent, Kennedy J. Hanley, and moves to dismiss the appeal hereto filed by the appellant in this action, and for grounds thereof assigns:

That the appeal purports to have been taken on behalf of the defendant Empire State-Idaho Mining and Developing Company, from an order made by the Circuit Court enjoining defendants, to-wit: Charles Sweeny, F. Lewis Clark and the appellant, and their agents, employes and persons acting under their authority, from taking or extracting any ores from the Skookum Mine, situated in Yreka Mining District, Shoshone County, Idaho, until further order of the Court.

And it appears from the appeal that the said defendants, Charles Sweeny and F. Lewis Clark, were not made parties to the appeal, and no reason is assigned for or any order made by the Court below to allow said parties to be omitted from said appeal.

Wherefore, respondent prays that said appeal be dismissed with his costs.

JOHN R. McBRIDE, AND
M. A. FOLSOM,
Solicitors for Appellee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.—NINTH CIRCUIT.

EMPIRE STATE IDAHO MINING AND DEVELOPING COMPANY, a Corporation,
Appellant,
vs.
KENNEDY J. HANLEY,
Respondent.

The Circuit Court having on the 17th day of May, 1902, made an order enjoining the defendants, Charles Sweeny, F. Lewis Clark and the Empire State-Idaho Mining and Developing Company in this suit, from working or taking any ore from the Skookum Mine, the subject of litigation between Kennedy J. Hanley and said defendants, until further order of the Court, one of the defendants, to-wit: the Empire State-Idaho Mining and Developing Company, has taken an appeal from that order to this Court.

We ask that this appeal be dismissed on the ground that the proper parties have not appealed. This suit has been in progress four years, and it has been a year since by decree of this Court the plaintiff was decided to be the owner of an undivided one-eighth interest in the mine in controversy.

The matter of an accounting against the defendants for valuable ores extracted from the mine by said defendants since the commencement of the action and from the 30th day of April, 1898, has not yet been completed, having been arrested by an order of the Circuit Court in March of the present year.

An appeal by one of the parties in this action can not be entertained unless the parties omitted shall have been permitted by the Court to sever from the appealing party. It is the undoubted rule that the parties taking an appeal must all be named in the appeal; it is for reason which the authorities fully sustain. The Court will not upon appeal try a cause by piecemeal, for, if one defendant may take an appeal without joining his co-defendants, each defendant may take an appeal, and thus the appeal proceedings be split up into as many appeals as there are defendants. In support of this motion we cite:

Masterson vs. Herndon, 10 Wall. 416.
Hardy vs. Wilson, 13 Supreme Court Rep., 39.
Davis vs. Trust Company, 14 Supreme Court Rep., 693.
Beardsley vs. Arkansas L. R. Company, 156 U. S.
Wilson vs. Kissel, 17 U. S. Sup. Court Rep., 124, and cases cited.

We respectfully submit that this appeal must be dismissed.

JOHN R. McBRIDE, AND
M. A. FOLSOM,
Solicitors for Appellee.

No. 843

—IN THE—

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a corporation,
Appellant,

vs.

KENNEDY J. HANLEY,
Respondent.

Answering Brief of Respondent.

JOHN R. McBRIDE,
M. A. FOLSOM,
Counsel for Respondent.

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STATEMENT OF FACTS.

This cause has been before this Court on an appeal and upon a petition for a writ of mandamus. The facts are fully stated in the opinions heretofore rendered. A certified copy of the recent decision in the mandamus proceeding was presented to the Circuit Court and the following motions were made by counsel for Hanley. (1) That the order suspending the proceeding on accounting be vacated and that the master be ordered to proceed. (2) That defendants be restrained from excluding Hanley from entering the Skookum

mining claim through the ordinary approaches to the same. (3) That defendants be restrained from removing ores from within the boundaries of the Skookum mine until final decree.

After argument the Circuit Court granted the several motions, but restrained defendants from removing ore only until further order of the Court. The Empire State-Idaho Company has appealed from that order.

The Statement of Facts presented in appellant's brief is erroneous in several particulars.

It is stated that the appellant owns an undivided seven-eighths interest in the Skookum lode claim. There is nothing in the record to show that this is the fact, and no adjudication of appellant's title has been made.

It is stated that the appellant and the respondent were mining partners under the laws of Idaho in the operation of this claim. There is nothing in the record to show such a fact, but, on the contrary, the record as well as the decision of this Court conclusively shows than Hanley has never participated in the working of the Skookum claim with the appellant, but has been excluded from working the Skookum mine and his title thereto has been denied at all times, and a fraudulent attempt has been made to deprive him of his interest in the property; that he has never been permitted to participate in the proceeds of the ores and appellant has refused to pay him one dollar of the same.

The statements made as to the purpose of the complaint

and the effect of the decree of this Court are completely refuted by the opinion in the mandamus proceeding, filed May 12th in this Court.

ARGUMENT.

In the recent mandamus proceeding, Hanley complained that the mandate of this Court was not being enforced in four particulars, viz:

That the Circuit Court refused to enforce payment of costs on appeal; that it suspended an order previously made for an accounting; that it refused to assist Hanley to enter and inspect his property; and that it refused to grant an injunction or receiver for the protection of the same. A full argument was made to this Court at that time, and the question which is now presented to this Court was urged at length then. This Court held that we were entitled to have the mandate enforced, and the trial Court, in obedience to its promise to protect Hanley in his rights, made such interlocutory orders as it deemed proper for his protection.

The audacity of appellant in again presenting to this Court the same question, which was raised before, is characteristic.

The situation which is presented is this: The defendants in the case by the *grossest fraud conceivable* have secured exclusive possession of the Skookum mine and had attempted to rob Hanley of his interest. They had for more than four years vigorously defended their fraud in Court, during all of

which time they despoiled the property of its ores. They had denied Hanley the right to even view the ore bodies in controversy, and had denied their liability to account to him for the proceeds. Notwithstanding the fact that this Court, more than one year ago, defined Hanley's interest in the property, the defendants have continued in the full control of the property and have continued to deny Hanley's rights in the face of the decree.

In December, 1901, the Circuit Court ordered defendants to account, but they have not accounted, nor paid over to Hanley a single dollar. They secured a stay of proceedings before the Master. In February, 1902, the Court ordered them to deposit in the bank *to the credit of the Court* one-sixteenth of the proceeds of ore *thereafter* taken out of the property.

The property in controversy has been rapidly exhausted, and, until the accounting in this case is perfected and the decree in favor of Hanley entered, it will be impossible to determine the extent of the injury done to him. It was proper under such circumstances that the remnant of it should be preserved until the extent of past injuries could be ascertained and settled.

That Hanley for more than four years has been the owner of a one-eighth interest in the Skookum mining claim and the ores therein contained has been determined by this Court. That the defendants during all that time have been actively engaged in lessening the value of that property is undisputed.

That Hanley now has a right to determine the extent of the ravages before any further destruction shall take place seems too simple a proposition to need argument.

No final decree has been entered in this case, and the Circuit Court by its strong arm is attempting to repair the wrong which the defendants have done to Hanley. It is engaged in ascertaining the amount of that wrong and has granted an injunction prohibiting defendants from devouring what remains of the property in dispute until past accounts have been settled.

In view of the acts committed by the defendants in the past, in deliberately attempting to rob Hanley of his property, it is not strange that they should have the boldness to now assert that they have a right to the fruits of their fraud. Their argument reduced to its simplest elements is, that because they have been adjudged guilty of fraud that nothing further remains to be done; that they should be permitted to retain the property and permit Hanley to comfort himself with the empty adjudication. It is unnecessary to say that a court of equity does not do business in that way.

RELATION OF MINING PARTNERSHIP DOES NOT EXIST, AND STATUTE OF IDAHO DOES NOT APPLY.

HANLEY IS NOT A MINING PARTNER WITH SWEENY, CLARK AND THE EMPIRE-STATE MINING COMPANY. THE QUESTION OF MINING AND PARTNERSHIP IS THEREFORE NOT IN THE CASE.

Counsel for appellant has repeatedly contended that his clients have a right to work the Skookum through their own tunnel to the exclusion of Hanley, because they claim to be the owners of seven-eighths of the Skookum. The Statute of Idaho upon the subject of Mining Partnership, and decision of Hawkins vs. Spokane Hydraulic Mining Company, 33 Pac., 924, are cited in support of the contention.

As Hanley *has not engaged* with the others, in working the property, he is not a mining partner.

The Supreme Court of Montana, in Anaconda Co. vs. Butte Co., 43 Pac., 925, thus correctly states the rule:

"A mining partnership is formed by reason of the exist-
" ence of certain facts described in the Statute. Those facts
" are: (1) That two or more persons shall own or acquire a
" mining claim for the purpose of working or extracting the
" minerals therefrom; that is to say, the relationship arises
" from the ownership of the shares or interests in the mine.
" This is the first fact of a foundation for a mining partner-
" ship. (2) The second fact required to exist is that such
" owners actually engage in working the mine. Do these
" two conditions exist in the case at bar? The first condition
" is a fact. Plaintiff and defendant own and have acquired
" for mining purposes the ground in controversy. *The second*
" *fact does not exist.* The plaintiff and defendant were not
" actually engaged i nworking the mine. This is clear from
" the pleadings and the testimony. *The plaintiff was working*
" *the disputed portion alone,* excluding the defendant there-

" from, *therefore the partnership did not exist.* (Citing sev-
" eral cases, including the Hawkins vs. Spokane case.) * * *
" In the Hawkins' case last cited there is one remark tending
" to show that the Court held a different view; but the Court
" stated that *a partnership was admitted* in that case, and in
" the opinion, further on, cited the case of Dougherty vs.
" Creary and that of Duryea vs. Burt (*supra*). Therefore
" we consider the question of mining partnership as not in this
" case." See to same effect, First National Bank vs. Hailey,
89 Fed., 449; 95 Fed., 35.

In the Hawkins' case the Court said: *"This partnership " is admitted by the defendant."* 28 Pac., 434, and further said:

"If the power thus held and exercised by the majority
" is used in a manner that will imperil or disastrously affect the
" interests of the minority, the latter has the right to resort
" to the court for redress and protection."

That Hanley's rights have been ignored and his interests imperiled has been established by former decisions of this Court. Because he has sought redress and protection in Court, and has been awarded it, defendants complain. While no partnership exists in this case, even if it did, the authority cited by counsel abundantly justified the order complained of.

The facts in the case at bar come squarely within the Anaconda case, and it is clear that Hanley cannot be held to be a mining partner with those who have attempted to rob him

of his interest in the Skookum and have despoiled the claim of its ores while excluding him from the property and the profits.

APPELLANT IS NOT ENTITLED TO CONTINUE TO FURTHER DESPOIL THE SKOOKUM MINE OF ITS ORES PENDING THE LITIGATION, BY REASON OF THE FACT THAT IT OWNS AN INTEREST IN THE CLAIM.

Counsel contended in the Circuit Court that even though his clients should not be held to be mining partners with Hanley, they should be permitted to remove the ores pending litigation. That they are tenants in common with Hanley in the property may be true. But that they have exclusively controlled for more than three years and still exclusively control the only opening to the ore bodies is undisputed. They have for more than three years denied Hanley's rights and still deny them. They have never paid or offered to pay one dollar to Hanley out of the profits received. The trial Court, on May 17, 1902, enjoined them from removing any ore from the property until further order, and at the same time enjoined them from preventing Hanley from entering the mine. Counsel contends that because the Court has compelled them to permit Hanley to enter the mine that the order enjoining his clients from working the ores should not have been made; that Hanley is no longer excluded, and therefore, defendants should be allowed to work.

It is too well settled to admit of argument that one tenant in common may not work the common property to the ex-

clusion of his co-tenant. If he does so he is a trespasser and may be enjoined.

Butte and Boston Co. vs. Montana Co., 60 Pac., 1039.

Anaconda Co. vs. Butte Co., 43 Pac., 924.

Sears vs. Sellew, 28 Iowa, 506.

If one tenant in common extracts ore from the common property *through his own shaft* on another claim, such action is an assumption of exclusive ownership, and an injunction will lie.

Anaconda Co. vs. Butte Co., 43 Pac., 924.

To constitute exclusion force need not be used. Denial of title or securing possession of the whole property by fraud amounts to exclusion.

Zapp vs. Miller, 109 N. Y., 57.

From the very nature of things Hanley cannot work the property, the only approach to the ores being a tunnel having its portal in the claim of defendants.

It is not surprising that these defendants, who have acquired possession of property by gross fraud and have kept possession of it by resort to every conceivable defense, should squirm when the hand of the Court is laid upon them. For years they have, by keeping up a fight, retained control of the ore bodies in dispute and have well nigh destroyed them. The Circuit Court has at last called a halt. It has said to these defendants: You shall not utterly destroy this property until the person whom you have wronged has been protected and the amount of damage you have done him has been ascer-

tained and adjusted. The only question to be decided upon this appeal is: Whether an empty adjudication shall be all that Hanley shall have, or whether he is entitled to have his property protected?

As the Supreme Court said in Rubber Company vs. Goodyear, 9 Wall., 803:

"The conduct of the defendants in this respect has not "been such as to commend them to the favor of a court of "equity. Under such circumstances every doubt and difficulty "should be resolved against them."

No final decree has been entered in this case by the trial Court. Such interlocutory decrees have been made as the circumstances of this case require for the ascertainment of the amount of past injuries and the preservation of the undestroyed remnant of the property until final decree.

The order appealed from was properly made for the purpose just stated, and should not be disturbed.

St. Paul, Etc., Co. vs. Northern Pac. R. R. Co., 4 U. S. Appeals, 149 *et seq.*

Respectfully submitted,

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M. A. FOLSOM,

Counsel for Respondent.